TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 104

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, APPELLANT,

vs.

JOSEPH B. THOMPSON, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, AND STRATTON SHARTEL, ATTORNEY GENERAL OF THE STATE OF MISSOURI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED MAY 22, 1929

(34,230)

(34,230)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 104

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, APPELLANT,

vs.

JOSEPH B. THOMPSON, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, AND STRATTON SHARTEL, ATTORNEY GENERAL OF THE STATE OF MISSOURI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

INDEX

	Original	Print
Record from the district court of the United States, Western Missouri	a	1
Citation with acknowledgment of service (omitted in printing)	b	
Caption (omitted in printing)	1	
Bill of complaint	2	1
Temporary restraining order	27	37
Bond on restraining order (omitted in printing)	31	
Order continuing restraining order	33	41
Application to disqualify Judge Merrill E. Otis	35	42
Order certifying disqualification to senior circuit judge.	36	43
Order designating Hon. Albert L. Reeves	37	43
Amendment to bill of complaint	39	44

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 8, 1929

	Orig	Print
Amendment to bill of complaint	41	46
Application for interlocutory injunction	43	46
Motion to dismiss or stay unless restitution be made	46	49
Motion to dismiss or stay unless bond be given	49	51
Motion to dismiss	54	55
Stipulation to transfer to western division	57	57
Order transferring to western division	58	57
Order substituting parties defendant	59	58
Order denying application for injunction	61	58
Petition for appeal	63	59
Assignment of errors	65	60
Order allowing appeal	70	63
Bond on appeal (omitted in printing)	71	
Appellant's præcipe for record	74	64
Statement of evidence	78	66
Plaintiff's Exhibit 1—Affidavit of Charles R. Street.	79	66
Plaintiff's Exhibit 2—Affidavit of F. P. Hamilton	93	76
Plaintiff's Exhibit 3—Affidavit of Paul W. Terry	102	83
Plaintiff's Exhibit 4—Affidavit of Paul W. Terry	110	91
Offer in evidence	111	92
Defendants' Exhibit "A"—Order of supreme court of Missouri, Ætna Insurance Co. vs. Hyde	112	93
Offer in evidence	112	93
Testimony of William S. Hogsett	112	94
Plaintiff's Exhibit 5—Mandate of U. S. Supreme Court, Ætna Insurance Co. vs. Hyde	113	94
Testimony of Guy M. Sone	115	95
Exhibit—Mandate of supreme court of Missouri, Ætna Insurance Co. vs. Hyde	115	96
Order approving statement of evidence	117	97
Opinion, Stone, J	118	98
Clerk's certificate (omitting in printing)	138	
Statement of points to be relied upon and designation as to printing	139	130

[fols. a & b-d] In Equity. No. 988

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, Plaintiff,

vs.

JOSEPH B. THOMPSON, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants

Citation, in usual form, showing service on Floyd E. Jacobs and John T. Barker, filed April 29, 1929, omitted in printing.

[fol. 1] [Caption omitted]

[fol. 2] **IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION**

BILL OF COMPLAINT—Filed Feb. 14, 1928

Now comes the above named plaintiff, National Fire Insurance Company of Hartford, and for cause of action against defendant, Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, and North Todd Gentry, Attorney General of the State of Missouri, states:

First

Plaintiff is now and at all times herein mentioned was a corporation of a state other than the State of Missouri and organized and existing under the laws of the State of Connecticut as a stock fire insurance company, authorized by its charter to do a business of fire, lightning, hail, windstorm and allied lines of insurance usually done by fire insurers, and it, the plaintiff, is a citizen and resident of the said last named state. Defendant, Ben C. Hyde, is now and at all said times was a citizen and resident of Jefferson City, Cole County, Missouri, and of the Central Division of the Western District of Missouri, and said defendant is and was at all said times the duly appointed, qualified and

acting Superintendent of the Insurance Department of the State of Missouri.

Defendant, North Todd Gentry, is Attorney General of the State of Missouri, and as such Attorney General is the chief law enforcing officer of said State, having supervision of the enforcement of the laws on behalf of the State against any person or corporation who may be claimed to have violated the law, and generally to enforce the law on behalf of said commonwealth; said North Todd Gentry is a resident of the State of Missouri and of the Central Division of the Western District thereof and a citizen of the State of Missouri.

[fol. 3] Second

The Court's jurisdiction depends upon the following grounds:

This is a suit of a civil nature in equity. The matter in controversy is of the value of $5,000 and exceeds, exclusive of interest and costs, the sum or value of three thousand (3000) dollars and

(1) arises under the Constitution of the United States; namely, the orders of the Superintendent (hereinafter specifically set forth) are asserted to be violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that the same (a) deny to plaintiff the equal protection of the laws; (b), deprive the plaintiff of its property and liberty without due process of law;

(2) arises under the Constitution of the United States, in that sections 6283 of the Revised Statutes of the State of Missouri, 1919 and said section as amended, by virtue of which the authority of the defendant, Ben C. Hyde, to make his said orders, and section 6287 of said statutes, under which the defendant, North Todd Gentry, threatens to proceed and will proceed if not enjoined, are void and violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that they (a) deny to plaintiff the equal protection of the laws; (b), deprive the plaintiff of its property and liberty without due process of law;

(3) is between citizens of different states, namely, the defendants are citizens of the state of Missouri, and the plaintiff is a citizen of the State of Connecticut.

Third

The facts are as follows:

Par. 1. Plaintiff is now and at all times herein mentioned was a stock fire insurance company engaged in the business of fire, lightning, hail and windstorm insurance, and authorized and licensed to do, and doing, said business in the state of Missouri.

In order to conduct its business in the State of Missouri, plaintiff has been obliged to establish, and did establish long before October 9, 1922, local agencies in the various cities and towns throughout the state, at large cost and expense, and the agencies so established are of great value. Without such agencies so established, it would be impossible for the plaintiff to conduct its business of insurance in the State of Missouri, and said established agency plants of the plaintiff are of great value to the plaintiff, namely of the value of $5,000.

Plaintiff has at great cost and expense made elaborate surveys and from such surveys has compiled elaborate maps, which are supplied to its agents and by them used in the writing of insurance in the State of Missouri. Said maps and surveys are of a reasonable value in excess of the sum of One Thousand Dollars.

In accordance with the requirements of Section 6270, R. S. 1919, and long before October 9, 1922, the plaintiff has compiled and does now maintain in the State of Missouri a public rating record, through medium of Missouri Inspection Bureau including extensive maps, surveys and other data, comprehending the result of inspection of many thou- [fol. 4] sands of parcels of insurable property in said state, from which the rate of premium applicable to each risk in this state may be ascertained in advance of the making of insurance thereon; such rating record includes general basis schedule, embodying basis rates, charges, terms, conditions, permits and standards, and such other data as are necessary for the computation and promulgation of equitable rates and rules of practice. Such records show the

forms and endorsements upon which each rate is predicated, and show the changes of rate to be made on account of each and every change of form or endorsement. Such rating record of plaintiff is of the value of more than $3,000.

Par. 2. On October 9, 1922, and since 1915, the date of its enactment, there was in force a certain public law of the state of Missouri, known as Section 6283, R. S. Mo. 1919, in words and figures following:

"Sec. 6283. Superintendent to investigate the reasonableness of rates—authority to order reductions.—The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. Any reduction ordered by the superintendent of insurance shall be applied, subject to his approval: Provided, that the superintendent of insurance shall designate the class or classes to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. In determining the question of rates and profits in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability, both within and without the state."

By Section 6284 of said statute it was provided that review of the orders and directions of the superintendent of insurance might be had by proper action in the courts.

Par. 3. On the 9th day of October, 1922, said defendant Hyde, purporting to act under such statute did promulgate an order in writing, which he served on this plaintiff and all other stock fire insurance companies doing business in Missouri, by serving the same upon Missouri Inspection Bureau, the rate-making organization to which plaintiff and

all other stock fire insurance companies in Missouri belonged. By said order he did direct as follows:

"You and each of you are hereby notified that I have this day ordered a reduction of ten per cent in the rates now charged by the aforesaid companies on fire, lightning, hail and windstorm insurance business written in the State of Missouri, which reduction, in my judgment, will still leave said companies a reasonable profit after giving proper and reasonable consideration to the conflagration liability both within and without the state.

The aforesaid reduction order shall take effect and be in operation on and after the 15th day of November, 1922, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not within thirty days from this order of reduction submit a class or classes which meets the approval of the Superintendent of Insurance, the superintendent will designate the class or classes to which the reduction shall apply."

[fol. 5] Par. 4. Thereafter, on November 10, 1922, purporting to act under Section 6284, R. S. Mo. 1919, 157 stock fire insurance companies, comprising all of said companies doing business in Missouri, and including this plaintiff, filed a joint review proceeding to review such rate reduction order, which case was considered on appeal by the Supreme Court of Missouri, which did sustain said order as against said review proceedings so jointly brought, and did justify said order of the superintendent as follows:

(a) That the standard of measurement of aggregate profit of all stock fire insurance companies in the state of Missouri during the five-year test period, covering calendar years 1917 to 1921 inclusive, whereby to limit their aggregate collections and restrict their aggregate earnings for the future should be based upon adoption of the amount of premiums received as income, and losses and expenses paid as outgo, thereby taking into account, as income, unearned premiums covering prepayment for liability of the future extending beyond said test period, and rejecting as outgo losses and expenses incurred, but not yet paid, although liability for same be firmly fixed during said test period. The experience of all stock fire insurance companies in the aggregate in Missouri for the years 1917 to

1921 inclusive, taking into account the premiums received as income, and losses and expenses paid as outgo, was as follows:

Premiums received	$83,502,181
Losses and expenses paid	80,161,057
Excess of premiums received over losses and expenses paid	$3,341,124

In the same years, the premiums earned and losses and expenses incurred were as follows:

Premiums earned	$74,813,816
Losses and expenses incurred	81,824,016
Excess of losses and expenses incurred over premiums earned	$7,010,200

(b) By taking into account as income, to ascertain aggregate experience of all companies during said five-year period, all interest derived by them from the investment of unearned premiums, said sum for the five years being found by the superintendent to be in the amount of $2,301,132.

(c) By rejecting from expense certain commissions actually paid by the stock fire insurance companies to their agents for securing business, upon the ground that the portion of said commissions so rejected upon business written in St. Louis, Missouri, was upon a commission rate higher than was paid to agents of said insurance companies in the remainder of the state, which said excess so rejected from expense was in the sum of $2,496,715.

(d) By rejecting from expense of said stock fire insurance companies, in ascertaining their aggregate experience for such test term, the item of federal war tax on Missouri premiums in fact incurred and paid by said stock fire insurance companies during the test term, the amount so rejected from expense being in the sum of $628,123.

Par. 5. After entry of the final judgment in the Supreme Court of Missouri, as aforesaid, in the year 1927, the stock fire insurance companies, petitioners in said review proceeding, inclusive of this plaintiff, jointly applied to the

Supreme Court of the United States for a writ of certiorari [fol. 6] to review said judgment of the Supreme Court of Missouri, which writ was issued but thereafter was dismissed for want of jurisdiction.

Par. 6. In the said review proceeding aforesaid, in the court of original jurisdiction, which was the Circuit Court of Cole County, Missouri, the plaintiff, together with all the said other stock fire insurance companies doing business in Missouri, 157 in number, did, upon the order and requirement of the Court in said cause, execute a bond with Fidelity & Deposit Company of Maryland as surety, in the penal sum of $500,000, to respond under the terms of said bond to the said defendant Hyde, for the use and benefit of all persons, firms and corporations to whom policies of fire, lightning, hail and windstorm insurance, covering property in the state of Missouri, may be issued by the plaintiff and the said other stock insurers on and after November 10, 1922 and prior to the entry of a final decree in said cause; and thereafter, in August, 1923, the said Court enacted a further bond in the additional sum of $500,000 from the plaintiff and said other stock fire insurance companies, which was then executed pursuant to the requirement of the Court, said bond being substantially upon the same conditions as said other bond. The surety upon said bond so last recited and described was Hartford Accident & Indemnity Company.

Par. 7. Prior to the making of said rate order of November 9, 1922, and since, plaintiff and 156 other stock companies doing business in Missouri did, each and all, write policies of insurance upon uniform rate charges, upon hazards in said state, the level of rates being fixed by basis rates and creation of relativity in rates throughout the state through the medium of Missouri Inspection Bureau, which made filings thereof for each stock company doing business in the state of Missouri, including the plaintiff. The effect of said filings was to place the charge for insurance by stock companies in Missouri upon a uniform level of rates, which method and manner of making and creating rates was sanctioned and directed by the statutes of Missouri. In addition to basis rates and schedules, specific rates or local tariffs were also made and published

respecting a great number of parcels of insurable property in the state, which property was inspected, valued, and rates published upon the same, which said publications were uniform as to all stock companies in the state, including the plaintiff, and likewise published and validated by law as aforesaid.

The level of rates existing at the time of the making of the order of said defendant Hyde aforesaid, as the same existed immediately before the making of his said rate order, has not been departed from but has been maintained and continued to the present time by the plaintiff and the various other stock fire insurance companies doing business in the state of Missouri.

Par. 8. Said defendant Hyde on February 1, 1928, did make designation of the class or classes of insurance to which the said reduction order aforesaid shall be applied by plaintiff and other stock insurance companies, namely upon all classifications of fire, lightning, hail and windstorm risks, and the said defendants Hyde and Gentry unless restrained and enjoined by this court will assert the validity of the said rate reduction order and the power of the defendant Hyde to make the said order pursuant to the said statute aforesaid, and will bring or cause to be brought many hundreds of suits on the part of or for the benefit of policyholders, and assert claims of hundreds of policyholders against the plaintiff who had policies of insurance, [fol. 7] and will sue the plaintiff upon said bonds aforesaid, and sue the said surties executing said bonds aforesaid to enforce the penalty of said bonds.

Par. 9. If the said rate order were to be placed in effect and the same applied to and enforced against plaintiff, and plaintiff be required to put such reductions in force, and plaintiff be required to write insurance at such reduced level it would reduce plaintiff's total income from its business of insurance in Missouri to the extent of about 10% and reduce rates of premium to be charged by this plaintiff in Missouri to a level so low as to be wholly inadequate to meet losses and reasonable expenses or to give any compensation to the plaintiff for the risks to be assumed by plaintiff under its policies of insurance, and would be such as to cause this plaintiff to do insurance business, in Mis-

souri without a reasonable profit, or any profit, and at a loss. Thereby, this plaintiff would be forced either to do such business at an actual loss, or alternatively to withdraw from doing such business in Missouri, and thereby the value of all of its many agency contracts, and of its agency plants, good-will, established business, maps, surveys and rating records, which it has established in Missouri at great cost and expense and which are of value only if it continues doing business in Missouri, and which are reasonably worth more than $5,000, will be entirely destroyed. In either alternative, plaintiff will be deprived of its property without due process of law by said rate reduction order, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of Constitution of Missouri.

Par. 10. By the term "written premiums," as herein employed, is meant all the premiums for a specified period received by insurance companies, including earned and unearned premiums. By "expenses and losses paid" is meant those losses and expenses paid during the period, not taking into account losses and expenses incurred for which liability exists but which have not in fact been paid during such period. By "earned premiums" is meant the prepaying for insurance in force during the specified period, whether written before or during such period. By "incurred losses and expenses" is meant expenses and losses for which liability becomes firmly fixed during the period, whether paid or unpaid.

A method of profit or loss accounting by taking earned premiums as an element of income and incurred losses and expenses as elements of outgo is sound and that treating written premiums as an element of income and paid losses and expenses as an element of outgo is an unsound method of accountancy, the balance upon which in no way discloses profit or loss.

The plaintiff, upon the measure of its individual experience, taking into account earned premium as an element of income and incurred loss and expense as elements of outgo during the five-year period before the date of the rate order and during the period since that time plaintiff has, during each such period, lost money and made no money whatso-

ever upon the conduct of its business of insurance in the state of Missouri.

To reduce the rates of premium upon its business so by it conducted at a loss and thereby increasing the loss which it will sustain thereon may not be justified by taking a balance at between written premiums and paid losses and expenses as applied to the aggregate experience of all companies in the state for five-year test period and upon striking a favorable balance by employment of such method to thereby justify a further and additional reduction of income of the plaintiff for the future.

[fol. 8] If said reduction order should be applied to business conducted by plaintiff, it would reduce the rates of premium to be charged by plaintiff in Missouri to so low a level as to take away all allowance for the conflagration hazard and all profit, and compel plaintiff, if it continues doing business, to do so at a loss, and no compensation whatever whereby it will be deprived of its property without due process of law in violation of said Section 1 of the Fourteenth Amendment, and Section 30 of Article II of Constitution of Missouri.

Par. 11. Said rate reduction order as justified by the Supreme Court of Missouri purports to justify said reduction in rates on the ground that in the years 1917 to 1921 inclusive, the aggregate profit of all companies upon their Missouri business was in excess of what is reasonable and the individual experience of plaintiff was in nowise considered, nor contemplated by said statute. The order, if applied to this plaintiff, would compel this plaintiff to reduce its rates, not on the ground that this plaintiff has made or its making an unreasonable profit or any profit, but on the ground that other insurance companies have derived an unreasonable profit. In truth and in fact this plaintiff did not within said years derive, or in the years 1922 to 1926 inclusive derive, and it is not now deriving an unreasonable profit from its insurance business in Missouri, but it has during said period 1917 to 1921 and period since 1921 operated and it now operates its business of insurance at a loss in Missouri although it has at all times conducted its business prudently, economically and soundly. The total income and outgo of this plaintiff on its business of insurance in Missouri during the years 1917 to 1921 inclusive were as follows:

Income (earned premium)	$2,024,766
Outgo (incurred losses and expenses)	2,330,251
Loss	$305,485

The total income and outgo of this plaintiff on its business in Missouri during the years 1922 to 1926 were as follows:

Income (earned premiums)	$2,768,502
Outgo (incurred losses and expenses)	2,793,407
Loss	$24,905

Upon its business of insurance in Missouri for the year 1927 the plaintiff's experience was even more unprofitable than in the preceding ten years.

Defendant's said reduction order, in directing plaintiff to reduce its rates, when it has lost and is losing money on its business in Missouri, on the ground that other companies have made or are making an unreasonable profit, and that plaintiff has income from sources other than its business of insurance in Missouri, confiscates and takes this plaintiff's property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of Constitution of Missouri.

Par. 12. Section 6283, R. S. Mo. 1919, is the sole and only statute purporting to authorize defendant to make said rate reduction order. Said statute is unreasonable, confiscatory, unconstitutional and void, as against this plaintiff, for these reasons:

[fol. 9] (a) Said statute purports to authorize defendant to order a reduction of rates to be charged by this plaintiff in Missouri, regardless of whether this plaintiff's experience in Missouri has shown or is showing a profit or a loss, but solely in the event that the result of the earnings in Missouri of all stock fire insurance companies for five years next preceding defendant's investigation shows that there has been an aggregate profit of all companies in Missouri in excess of what is reasonable; and so the power to reduce this plaintiff's rates is made dependent, not upon this plaintiff's experience, but upon the experience of other com-

panies, competitors of plaintiff, in which plaintiff has no interest and over which plaintiff has no control. In so providing, said statute confiscates and deprives this plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and of Section 30 of Article II of the Constitution of the State of Missouri.

(b) The business of fire insurance is purely and exclusively a private business, and may be transacted by private persons in their individual capacity, or by unincorporated or incorporated companies. The amount of indemnity and the premium is a matter of private negotiation and agreement.

The business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, and cannot be compelled.

The business of plaintiff is not a public business, is not affected with a public interest or so affected to such an extent as to empower the State of Missouri to regulate plaintiff's rate of charge for insurance to be written in Missouri. There is no constitutional power in the State of Missouri to fix the rates and charges for services rendered by it, and the exercise of such power is a taking of private property for a public use, and deprives plaintiff of its property without due process of law, and a denial of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of Missouri.

(c) Said statute arbitrarily and unreasonably restrains and curtails and interferes with the right of the plaintiff, on the one hand, and its customers, the insured, on the other, to contract as to the rates to be charged by the former and paid by the latter for insurance written, and thereby deprives plaintiff of its liberty, property and right of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

(d) Said statute delegates to the defendant the exercise of legislative power, and the administration of legislative

power, but wholly fails to provide any standard rule or guide by which such power shall be exercised by defendant, and leaves the same to defendant's untrammeled whim and caprice, in contravention of Article III, and of Section 1 of Article IV, and of Section 30 of Article II of the Constitution of Missouri.

(e) Said statute as construed and applied by the Missouri Supreme Court in the aforesaid review proceeding provides that the ascertainment of the aggregate profit of the insurance companies during the five years statutory test period, and reduction of rates, of all companies, inclusive [fol. 10] of plaintiff, to be applied to business of the plaintiff shall be based upon the amount of premiums received less the losses and expenses paid by said companies, instead of upon the amount of premiums earned less losses and expenses incurred by said companies during said period. The profit or loss of an insurance company or a number of insurance companies during a given period can only be ascertained by taking into account as elements the amount of the incurred losses and expenses and the earned premiums of said period and not by taking as elements the received premiums and paid losses and expenses.

The interest on unearned premiums was found by the superintendent to be $2,301,132.

As applied to the business of the test period, 1917 to 1921, said statute as construed and applied by the Missouri Supreme Court in said review proceeding requires that $8,688,365 of premiums received, but not earned, shall be treated as accrued income of the test period, and requires that $1,662,969 of incurred and unpaid losses and expenses shall be rejected as outgo of the test period. Said statute thereby prescribed a method of calculating the companies' profit or loss, for rate making purposes, and undertakes thereby to justify reduction of income of plaintiff thereby increasing its loss upon the conduct of its business of insurance in Missouri, which is unreasonable, arbitrary, capricious, oppressive, fundamentally erroneous and confiscatory. Said statute in purporting to authorize defendant to make an order reducing this plaintiff's rates, based on such method of calculation, confiscates and takes this plaintiff's property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the

United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

(f) Said statute as construed and applied by the Missouri Supreme Court in the aforesaid review proceeding provides that in the ascertainment of the aggregate profit during the five-year test period, although all premiums received are to be treated as accrued income, yet there shall also be treated as accrued income all interest derived from the investment of unearned premiums. In the years 1917 to 1921 the interest earnings of all companies on their Missouri unearned premiums as found by the superintendent were $2,301,132. Said companies had two separate and distinct activities, underwriting and investment, each of which activities is productive of a profit or a loss. Said element was no part of operating income of said insurance companies on their Missouri insurance business. As applied to the business of the test period, 1917 to 1921 inclusive, said statute as construed and applied by the Missouri Supreme Court in said review proceeding requires that in ascertaining profit or loss for the purpose of fixing rates to be charged by this plaintiff, $2,301,132 interest derived by all companies from the investment of unearned premiums shall be treated as underwriting income of said insurance companies and so applied toward a reduction of this plaintiff's rate of premium for underwriting. Said statute thereby prescribed a method of calculating the companies' profit or loss for rate making purposes, which applied to the business of plaintiff and as justifying reduction of its rates is unreasonable, oppressive, fundamentally erroneous and confiscatory. Said statute in purporting to authorize defendant to make an order reducing plaintiff's rates, based on such a method of calculation, confiscates and take- this plaintiff's property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

[fol. 11] And said statute as so construed and applied by the Missouri Supreme Court to the business of the test period, authorizes an order reducing this plaintiff's rates, not on the ground that this plaintiff has derived or is deriving interest from its unearned premiums but on the ground that other companies have done so and so plaintiff's

rates are reduced because other companies, competitors of plaintiff, in which plaintiff has no interest and over which plaintiff has no control, are alleged to have derived interest from the investment of their unearned premiums.

Said statute as so construed and applied, insofar as it authorizes a reduction of plaintiff's rates because of investment earnings derived by plaintiff, and by plaintiff's competitors, confiscates plaintiff's property and deprives plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

(g) Said statute as construed and applied by the Missouri Supreme Court in the aforesaid review proceeding provides that in ascertaining the profit or loss of stock fire insurance companies during the five year test period there shall be deducted from the companies' expenses all excess commissions paid by them to their St. Louis agents, by which is meant, commissions on a scale higher than that in force in the remainder of the state. Said statute as construed and applied by the Missouri Supreme Court to the business of the test period 1917 to 1921 inclusive requires that $2,496,715 of such excess commissions shall be deducted from the companies' expenses, although said sum was actually incurred and paid during the test period by the companies, in good faith, and as an expense which according to the best judgment and discretion of the companies' officers and directors was necessary and reasonable, and was due to competitive conditions between said companies and with others in St. Louis over which plaintiff company had no control.

Plaintiff paid no amount whatever for commissions or any other expense which it could avoid or escape and paid no commissions upon business in St. Louis or elsewhere in Missouri not forced upon it by competition, and same as paid and incurred by plaintiff was sound, justifiable and approved by its officers and directors in the exercise of sound judgment, and plaintiff says that to reduce rates of plaintiff because of any unwarrantable or unreasonable expense paid or incurred by its competitors is confiscatory.

The amount paid by it for commissions to St. Louis agents at rate in excess of rate obtaining in the remainder of the

state did not for any period in this bill mentioned exceed 3.3% of earned premiums.

Said statute as so construed and applied prescribes a method of ascertaining profit or loss for rate making purposes which is unreasonable, arbitrary, capricious, fundamentally erroneous and confiscatory; and in purporting to authorize defendant to make an order reducing plaintiff's rates, based on such methods, said statute confiscates plaintiff's property and deprives plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of Missouri.

(h) Said statute as construed and applied by the Missouri Supreme Court in the aforesaid review proceeding provides that in ascertaining the aggregate profit or loss of the stock fire insurance companies during the test period [fol. 12] there should be deducted from the companies' expenses all federal war taxes on Missouri premiums.

Said statute as construed and applied by said Court to the business of the test period requires that $628,123 federal war tax on Missouri premiums should be deducted from the companies' expenses, although said sum was actually incurred and paid by the companies (including plaintiff) as a war tax exacted by the Federal Government and levied upon the companies' Missouri premiums during the test period.

Said statute as so construed and applied prescribes elements of ascertaining profit or loss for rate making purposes, which are unreasonable, arbitrary, capricious, fundamentally erroneous and confiscatory; and in authorizing defendant Hyde to make an order reducing plaintiff's rates, based on such elements, said statute confiscates plaintiff's property and deprives plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of Missouri.

(i) The provisions of said section 6283, of the Revised Statutes of Missouri 1919, as construed and applied under the laws of said state, are limited to stock fire insurance companies, and exempt therefrom mutual companies, recip-

rocal exchanges, and individuals making insurance upon like hazards as those written by the plaintiff and other stock fire insurance companies in the state of Missouri. Said section distinguishes between fire insurance companies and other insurance companies, individuals and persons, and distinguishes between insurance and other lines of business.

The business of insurance, as conducted by the plaintiff during all the period aforesaid and as conducted by other stock fire insurance companies in Missouri, was also conducted by mutual insurance companies, reciprocal exchanges, and individual insurers, who, and each of them, did, during all the period of time aforementioned, write insurances of like kind and character and upon the same character and type of risks, and were in competition with the plaintiff and other stock fire insurance companies, and said other insurers so mentioned did do a large amount of business, involving hundreds of thousands of dollars of premiums in the state of Missouri from year to year during said period. And the said statute, by thus authorizing and empowering said defendant, superintendent, to reduce rates of the plaintiff and other stock fire insurance companies upon consideration of the experience of stock fire insurance companies in the state, and by exempting from and not including in the provisions of said statute said other insurers, thereby placed great burdens upon the plaintiff and other stock fire insurance companies in the state of Missouri, and thereby does deny to the plaintiff the equal protection of the laws, in contravention of the first article of the Fourteenth Amendment of the Constitution of the United States, and section 30 of Article II of the Constitution of Missouri.

(j) Although the said statute of Missouri authorizes and empowers and orders the superintendent to make a reduction of rates under the circumstances in said statute provided, there is no provision in the statutes of Missouri whereby said superintendent may be compelled to grant any increase of rates, even if such increase be required and necessary to avoid confiscation. Said statutes of Missouri, as construed by the Supreme Court of Missouri, provide and permit no remedy by the plaintiff for review of the order of the superintendent declining to permit an increase

of rates, and do not permit or authorize any action of the [fol. 13] plaintiff to compel or enforce an increase of rates even if upon its experience and upon the experience of all stock companies in the state such increase be necessary to avoid confiscation. Wherefore said rating statutes prohibit and debar it, the plaintiff, from enforcing or compelling any increase of rates to avoid confiscation, and any application for increase would be futile, because said superintendent has since made an additional rate reduction order hereinafter referred to, whereby plaintiff is deprived of its property without due process of law, and is denied the equal protection of the laws, in violation of the first section of the Fourteenth Amendment of the Constitution of the United States, and of section 30 of Article II of the Constitution of Missouri.

(k) Said Section 6283, as so above set out, and the said statute as amended, as hereinafter set out, makes no provision for any notice to plaintiff, or other insurance companies affected by any order to be made, of any hearing before the superintendent of insurance, and gives no opportunity or right to the plaintiff, or other insurance companies to be affected thereby, to be present or to be heard or to present evidence or to present objections to any such proposed order, but permits the superintendent of insurance to make an order without notice to or hearing on the part of or arguments by this plaintiff or other insurance companies interested therein. Wherefore the said section, as originally enacted and as amended, violates Section 1 of Article XIV of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

(l) The provisions of said Section 6283 are by the terms thereof made to apply only to and to regulate only the rates by stock fire insurance companies. There are other stock insurance companies authorized by the laws of Missouri and doing a large amount of business in the said state, organized under the second and third paragraphs of Section 6203, namely, the second and third divisions of said section, and creation whereof is authorized by Section 6206 of said Revised Statutes, and foreign companies also falling within such classes; and said other stock companies, during the period mentioned, did insure in large amounts divers

property against the same hazards of fire, lightning, hail or windstorm as were insured by the plaintiff and other stock fire insurance companies and, nevertheless, the plaintiff and other stock fire insurance companies so designated and described by the laws of Missouri, were made subject to such rate regulatory provisions, but other said stock insurers, insuring against the same hazards and insuring property against the hazards of fire, and against the hazards of lightning, and against the hazards of hail, and against the hazards of windstorm, were exempted from and not included in the regulatory provisions herein complained of; and by virtue of such discriminatory nature of the said laws of Missouri it, the plaintiff, by the terms of said statute and enforcement thereof, is denied the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of Missouri.

Par. 13. In the year 1923, the Legislature of the State of Missouri revised and amended section 6283 of Revised Statutes of Missouri to read as follows:

"Sec. 6283. Superintendent to Investigate the Reasonableness of Rates—Authority to Order Reductions.—The superintendent of insurance, upon written complaint of any citizen, or upon his motion, is hereby empowered to investi- [fol. 14] gate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this state by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the superintendent of insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the superintendent of insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration ex-

pense of such companies and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds."

Thereby, in addition to the considerations applicable to section 6283 as existing before that time, the legislature specifically authorized the superintendent of insurance of said state to take into consideration acquisition cost of the companies, their administration expense and all earnings of such companies, including investment profits, and to empower him to consider whether their underwriting activities were conducted on a basis which he considered reasonably economical, and to consider whether or not their investments have been and are being made in a safe and reasonable manner, and declared the intention of that section to provide that policyholders should not be charged rates which would cover losses occasioned by extravagant methods or unsafe or speculative investment of funds. Said statute provided no guide or rule by which such various considerations were to be applied by the superintendent, but left same to his untrammeled judgment.

Par. 14. After the enactment of said statute and after the same went into force defendant Hyde, on the 9th day of November, 1923, without any notice whatever to plaintiff of any hearing or consideration, or intention to make any order, did make, issue and promulgate an order as follows:

"Insurance Department, State of Missouri, City of Jefferson

To Missouri Inspection Bureau Waterworth & Terry, Managers, Pierce Building, St. Louis, Missouri, and to all Stock Fire, Lightning, Rail and Windstorm Insurance Companies doing business in the State of Missouri:

Upon complaint filed with me that there should be a reduction in the rates charged by the stock fire insurance com-

panies doing a fire, lightning, hail and windstorm insurance business in the State of Missouri, and upon full investigation and hearings and in full compliance with the laws of [fol. 15] Missouri, it appears to me that the rates charged in this State by the stock fire insurance companies, for the five years next preceding such investigation, to-wit, the years 1918 to 1922 inclusive, are producing a profit in excess of what is reasonable.

Accordingly, you and each of you are hereby notified that I have this day ordered a reduction of fifteen per cent (15%) in rates now authorized by the Missouri Inspection Bureau and being collected by the aforesaid companies on fire, lightning, hail and windstorm business written in the State of Missouri, which reduction in my judgment will leave said companies a reasonable profit after giving proper and reasonable consideration to the conflagration liability both within and without the State.

The aforesaid reduction order shall take effect and be in operation on and after the 15th day of December, 1923, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not within thirty days from this order of reduction submit a classification or classifications, which meets the approval of the Superintendent of Insurance, the Superintendent will apply such reduction in such manner as appears to him to be just and equitable.

(Signed) Ben C. Hyde, Superintendent of Insurance of the State of Missouri.

Dated at Jefferson City, Missouri, this 9th day of November, 1923."

A copy of said order was served upon the Missouri Inspection Bureau as agent of the plaintiff herein.

On and prior to making the said order of November 9, 1923, said defendant made no investigation, held no hearings whatever, and no evidence was offered or produced before him, or if the defendant had any pretended hearing, or made any pretended investigation with respect to the matters in said order, it was without notice to plaintiff, or any agency of it, and without any reasonable opportunity or any opportunity to plaintiff to be present and plaintiff was not present.

Par. 15. The defendant Hyde, so proceeding without notice to or knowledge of the plaintiff of his supposed investigation, and without notice or knowledge of his said hearings, and in the absence of the plaintiff, did make his said rate order and therein did purport to take into account the experience of stock fire insurance companies in the state of Missouri for the preceding five years, namely, the calendar years 1918 to 1922 inclusive; and plaintiff is informed and believes and therefore states that he did take into account all the various matters which are recited in the statute as matters which he might take into consideration, namely, the supposed profits of all stock fire insurance companies in the state, items of acquisition cost and administration expense of competitors of it, the plaintiff, over which the plaintiff had no control and the expense of which said competitors' business was not sanctioned, approved or incurred by plaintiff; and the said defendant Hyde did take into account all the earnings of such other stock companies, including investment profits which, as to divers of said other stock companies, were in large sums of money; and did take into account also investment profits asserted and [fol. 16] claimed by the said defendant to have been earned or derived by plaintiff, although the plaintiff had no investment profits of any kind in the state of Missouri, or in any wise derived from its business of insurance conducted in said state. Plaintiff is informed and believes and therefore states that said defendant did, upon standards of supposed economy, reject large items and elements of expense in fact incurred and paid by various stock insurance companies and various expenses incurred and paid by the plaintiff, and did disallow and refuse to consider the same; plaintiff's business was conducted economically and soundly. And plaintiff is informed and believes and therefore states that the defendant did reject certain elements of outgo and take into account, as supposed items of income, various other sums, upon the ground that investments of certain stock companies other than it, the plaintiff, were not safe and reasonable; and did likewise, as to certain other such income and outgo, take like action respecting income and outgo of the plaintiff. In each and every of the said matters aforesaid defendant, by his said act and conduct and by his said order and proceeding without notice and by consideration of the elements by him employed in making his order,

did violate the constitutional rights of the plaintiff, and did thereby take the property and liberty of the plaintiff without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of Missouri.

Par. 16. The experience of all stock fire insurance companies in the aggregate, in Missouri, for the years 1918 to 1922 inclusive, upon the basis of premiums received as income and losses and expenses as outgo, (without either rate order applied,) was as follows:

Premiums received	$91,004,156
Losses and expenses paid	90,937,586
Profit	$66,570

In the same years the premiums earned and losses and expenses incurred (without either rate order applied) were as follows:

Premiums earned	$83,206,537
Losses and expenses incurred	92,137,811
Loss	$8,931,274

Said rate order last described, if applied to and enforced against the plaintiff, would require the plaintiff to put in force a reduction, as therein specified, and cause it to write rates at a lower rate of insurance than provided for by the rate order previously above set forth, and thereby still further increase the loss of the plaintiff, and the rate level, if so established, would be a level wholly inadequate to meet losses and reasonable expenses, or to give to the plaintiff any compensation whatever for the risks to be assumed by it under policies of insurance, and cause it to do business in Missouri at a loss, and thereby would be forced either to do business at an actual loss or withdraw from doing business in Missouri, and thereby lose the value of all of its agency plants, established business, maps, surveys and rating records aforesaid. In either alternative, plaintiff would be deprived of its property without due process of law, if said rate reduction order be enforced against it, in violation of section 1 of the Fourteenth Amendment of the Constitu-

tion of the United States, and section 30 of Article II of the Constitution of Missouri.

The plaintiff, upon the measure of its individual experience, taking into account earned premium as an element of income and incurred loss and expense as elements of outgo during the five-year period before the date of the rate order, [fol. 17] and during the period since that time, has during each such period, lost money and made no money whatsoever upon the conduct of its business of insurance in the state of Missouri. To reduce its rates of premiums upon its business so by it conducted at a loss, and thereby increase the loss which it will sustain thereon, is not justified by taking a balance as between premiums received and losses and expenses paid, as applied to the aggregate experience of all companies in the state for the five-year test period, and by striking a balance by employment of such method to thereby justify a reduction of income of the plaintiff. Even taking into account premiums received as income and losses and expenses paid as outgo, and interest on unearned premium as income, as applied to the five-year test period preceding the said order of the defendant, Hyde, the rate reduction so by him ordered would be destructive of all profit to the plaintiff.

Par. 17. The said rate reduction order, as justified by the statute, sustains the said reduction on the ground that in the years 1918 to 1922 inclusive, the aggregate profit of all companies upon their Missouri business was in excess of what is reasonable, and the individual experience of plaintiff was in nowise considered nor contemplated by said defendant Hyde in his proceeding under the said statute. The order, if so applied to the plaintiff, would compel this plaintiff to reduce its rates, not upon any assumption that the plaintiff had made or is making any unreasonable profit, or any profit whatever, but upon the basis that other insurance companies have derived an unreasonable profit from their conduct of insurance business in Missouri, or from investment of funds by them, or otherwise. In truth and in fact this plaintiff did not, in the said years so adopted as a test, namely, the years 1918 to 1922 inclusive, nor in the period since that time, derive, nor is it now deriving any unreasonable profit from its insurance business in Missouri, but during such respective periods it has operated and now

operates its business of insurance in Missouri at a loss. The total income and outgo of this plaintiff on its business of insurance in Missouri, during the years 1918 to 1922 inclusive, were as follows:

Income (earned premiums)	$2,272,333
Outgo (incurred losses and expenses)	2,711,762
Loss	$439,429

During the period since 1922 plaintiff has upon said basis suffered a large loss, and has made no profits whatever upon its business in Missouri, and its experience was no more favorable than in any of the periods above tabulated.

Defendant Hyde's said reduction order, in directing plaintiff to reduce its rates when it has lost and is losing money on its business in Missouri, on the alleged ground that other companies have made or are making an unreasonable profit, and in taking into account supposed profits of the plaintiff not derived from its business of insurance in the state of Missouri, confiscates and takes this plaintiff's property without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and section 30 of Article II of the Constitution of the state of Missouri.

Par. 18. In the defendant Hyde's pretended calculation of profit or loss for the said five-year test period, he took into account as income certain amounts in no wise income from business of insurance and rejected proper income arbitrarily and did adopt arbitrary, confiscatory and unjustifiable elements, and plaintiff is informed and believes and therefore states the fact to be that defendant Hyde took into consideration as income certain large sums of money repre- [fol. 18] sentative of investment profits, being interest on the capital and surplus of plaintiff and other insurance companies doing business in Missouri during said period; and also took into account interest on unearned premiums of said companies. Said insurance companies, including the plaintiff, have two separate and distinct activities, underwriting and investment, each of which is productive of a profit or loss. The method of calculation so employed took income from the investments of a distinct department of the business of said companies and applied the same toward a

reduction in rates in their underwriting department, and justified the said rate order by so doing. The effect of such method so employed is to turn an actual loss of the companies doing business during said period into an apparent profit upon their business of insurance, and to apparently overcome the loss by them sustained on their business of insurance by application of income from their invested assets. Said action of the defendant Hyde in his said rate order, in so taking into consideration income of said various insurance companies other than their underwriting income, and taking into account such investment income of insurers other than the plaintiff, and taking into account interest on capital and surplus of the plaintiff, and taking into account capital and surplus in still much greater amount of other insurance companies, and in taking into account interest on unearned premiums of plaintiff and of other insurance companies in a still greater sum is unreasonable, fundamentally erroneous, unjust and confiscatory in applying the same to the plaintiff, and deprives the plaintiff, by virtue of the rate order based on such considerations, of its property and liberty without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and section 30 of Article II of the Constitution of Missouri.

Par. 19. The defendant Hyde, in his said considerations employed in making his said rate order did reject from consideration great sums of expenses in fact incurred and paid by insurance companies doing business in the state of Missouri during said test period, rejecting as plaintiff is informed and believes and therefore states items of commissions incurred and paid to agents, taxes imposed by law and for which said companies were liable and which were by them paid; and certain large sums were by him rejected from outgo as acquisition cost and administrative expense of which he, the said defendant, disapproved and which were by him considered and regarded as not reasonable, or economical, and undertook to substitute his judgment for that of the plaintiff and its officers and the officers of other insurance companies as to investments, commissions, expenses in the conduct of their business, and in general the said defendant undertook to exercise visitorial powers over matters of internal management of the

plaintiff and other insurance companies, and thereby invaded the inherent right of the plaintiff to manage and conduct its own affairs, and did thereby penalize and reduce the rates of the plaintiff as respects the said divers matters in no wise within its control and largely beyond its power and over which it had no control or management, and respecting which there was in no wise any impropriety, unsoundness, lack of economy, or mismanagement, and in so applying said matters to a reduction of rates of it, the plaintiff, the plaintiff is deprived of its property and liberty without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and section 30 of Article II of the Constitution of Missouri.

Plaintiff is not able to state the matters in the foregoing paragraph with more or greater particularity because no notice was given it so that it might be present upon consideration of said matters, nor was it present or repre-
[fol. 19] sented when said matters were under consideration or decided, but the plaintiff says that the said matters so aforementioned and so unlawfully and unconstitutionally considered and taken into account by the said defendant, as in the foregoing paragraphs heretofore set forth, were so great that his action therein, had his consideration thereof come to a contrary conclusion, would, of necessity, have produced a contrary conclusion on his part and left the said rate order without any justification.

Par 20. "Interest on unearned premium" is the amount derived upon the invested part of unearned premium in hand during specified periods. Owing to the fact that the same is not segregated in the assets of insurance companies, and that a large part of their assets are kept in liquid and uninvested form, and that the same shifts from time to time, it is a matter of great difficulty, almost an impossibility, to calculate the amount of interest on unearned premium.

The same is not any item proper for consideration in considering the income of an insurance company from its insurance activity.

During each of the respective periods in this petition above mentioned, at any time from the year 1917 to the

present time, the interest on unearned premiums by plaintiff derived and earned did not, in any of said periods, exceed in amount two per cent of the earned premiums of the plaintiff.

Two per cent of the earned premiums is a sum adequate to cover the interest on unearned premiums of all the companies doing business in the state of Missouri during any of the periods above in this petition recited.

Par. 21. Said Section 6283, as so enacted in 1923, namely, the said section as amended and as now existing, constitutes the sole and only authority for action by the defendant in making his said rate reduction order in paragraph 14 above set forth. Said statute is unreasonable, arbitrary, unconstitutional and void in each respect in the twelfth paragraph above recited and there alleged, as respects said section before amendment, which allegations in said paragraph 12 are here incorporated by reference as if here again set forth. In addition thereto, said section, as existing since its enactment in the year 1923 and as now existing, is unreasonable, arbitrary, confiscatory, unconstitutional and void, for the following reasons:

(m) Said statute provides that in determining the question of rates and profits, said Superintendent of Insurance shall take into consideration the acquisition cost and administration expenses of such companies, and shall consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis; and that said statute thereby gives said Superintendent of Insurance visitorial powers over the internal management of said companies and invades the inherent general right of said companies to manage their own affairs, and unreasonably interferes with said companies' inherent right of management thereof; and, therefore invades rights of plaintiff and likewise deprives plaintiff of its liberty and property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 30 of Article II of the Constitution of Missouri.

(n) Said statute provides that in determining the question of rates and profits, said Superintendent of Insurance

shall consider whether or not said companies' investments have been, and are being, made in a safe and reason-
[fol. 20] able manner; and said statute thereby undertakes to give said Superintendent of Insurance visitorial powers over the internal management of said companies and invades the inherent general right of said companies to manage their own affairs and to make their own investments, and is an unreasonable interference with said companies' inherent right of management and control thereof; and undertakes to authorize said Superintendent to control making by said companies of investments of funds owned by their stockholders, and to substitute in place of the discretion of the directors of said companies, the opinion and judgment of the Superintendent of Insurance; and likewise invades the rights of plaintiff and therefore deprives plaintiff of its liberty and property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 30 of Article II of the Constitution of Missouri.

(o) Said statute provides that in determining the question of rates and profits, said Superintendent of Insurance shall take into consideration all earnings of such companies, including investment profits; and said statute thereby undertakes to authorize and direct said Superintendent of Insurance, in determining whether said companies, including plaintiff, have made a profit or loss, and in fixing rates of premium for underwriting insurance risks, to take into account the profits and earnings of such companies, including plaintiff, from sources wholly distinct, separate and apart from underwriting.

Plaintiff has a capital derived from stockholders, and in addition has a surplus, in part contributed by stockholders and in part accumulated from the earnings of the plaintiff in various states of the Union other than Missouri, and which surplus is the property of the stockholders and independent in its origin of policies of insurance issued to policy holders in Missouri.

Profits made and the losses sustained upon the investment of capital and surplus are entirely distinct and separate from profits and losses from underwriting activities of plaintiff, and are separate and distinct therefrom.

The investment of said funds and the conduct of such investment is uniformly made at the home offices of the plaintiff and outside of the State of Missouri and is in no wise involved in or a part of the business of the plaintiff conducted in the State of Missouri.

Said provisions of the said statute of Missouri last above referred to, if applied by an order of the defendant Hyde based thereon, compel the plaintiff to write policies of insurance at an amount of premium, reducing its return thereon to the extent and by the amount that same is reduced by applying thereto the aforesaid investment earnings and profits.

For all of the aforesaid reasons said statute is unreasonable, arbitrary and confiscatory, and deprives plaintiff of its property and liberty without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 30 of Article II of the Constitution of Missouri.

(p) Said statute delegates to said Superintendent of the Insurance Department legislative powers, and undertakes to vest in him an arbitrary and untrammeled discretion in the exercise of such power, but wholly fails and omits to prescribe any certain guide, rule of action or standard by which the power and discretion therein granted are to [fol. 21] be exercised by him; all of which is in violation of Article III of the Constitution of Missouri and of Section 1 of Article IV of the Constitution of Missouri, and of Section 30 of Article II of the Constitution of Missouri, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth

Par. 1. Unless this Court grants the relief herein prayed for, and if either of said reduction orders should be enforced, the plaintiff would sustain irreparable injury and damage, in that plaintiff would either be compelled to issue policies of insurance and conduct its business at a financial loss in Missouri, or cease doing business in Missouri and thereby lose its agency contracts, agency plants, established business, maps, surveys, rating records and goodwill aforesaid, which are of great pecuniary value. If de-

fendant Hyde's said order should be enforced and applied and the plaintiff should refuse to comply therewith, defendant Hyde will proceed to revoke the licenses of plaintiff and its agents to do business in Missouri, and defendants will institute and prosecute criminal actions against plaintiff and its many hundred agents in Missouri, and plaintiff and its said agents will thus be subjected to numerous prosecutions to recover many thousands of dollars in fines and penalties, accumulating in respect to plaintiff in the sum of many thousand- of dollars.

The actual loss to the plaintiff, if the said rate orders aforesaid be enforced against it, and the diminution of the income of the plaintiff for each day, which it would suffer upon continuance of its business in Missouri, if the said rate orders be not enjoined, would amount to not less than $50.00 each day that plaintiff would be required to write its insurance at such reduced rates.

Par. 2. The defendants have threatened, and unless restrained and enjoined by this court will take unlawful and unconstitutional action against and interfere with the business of the plaintiff in the following particulars:

Each defendant has asserted and if not enjoined, will assert and publish to the insuring public of Missouri, that the premium charges at the rates at which the plaintiff has been exacting the same, and which it proposes to exact upon its contracts of fire insurance, namely the rates without deduction therefrom of the decreases ordered by the defendant Hyde, are unlawful, and that the public need not pay or contract to pay the same to the plaintiff; whereby many persons will be induced to refuse and decline to take insurance with the plaintiff and to pay to the plaintiff premium charges which it may and would demand and exact upon its insurances on properties in this state, and unless the defendants be enjoined, they will bring or cause to be brought proceedings to enjoin or interfere with the collection by the plaintiff of such premium charges; and will cause actions and proceedings to be brought against the plaintiff and against its officers, directors, employes and agents, in which said proceedings enormous and excessive fines and penalties prescribed by the laws of Missouri for violation of said insurance laws

would be imposed, and each issuance of a policy by or on behalf of plaintiff treated as a separate violation of law, and each exaction of premium treated as a separate and distinct offense, and each application of such pre-existing rate treated as a separate offense, and will bring or cause to be brought actions to impose fines and actions to imprison the said representatives of the plaintiff before mentioned, and will bring or institute proceedings to revoke and cancel licenses of the plaintiff and agents of the plain-
[fol. 22] tiff, of whom there are many in Missouri, and will, unless restrained, refuse renewal of the license of the plaintiff in this state and of its agents upon the ground of failure to conform to such void orders made under such unconstitutional statutes aforesaid, and would subject the plaintiff to great and irreparable loss and damage and subject plaintiffs, its officers, employes and agents to a multiplicity of suits, and such action of the defendants would each be a trespass by defendants under a void rate order and under a void and unconstitutional law; and the defendants do not have sufficient financial responsibility to answer adequately in the damages that would be sustained by plaintiff; and it would be wholly impossible to adequately and legally measure the amount and extent of such damages; and such conduct and actions would deprive the plaintiff of its property and its liberty of contract, without due process of law and deny to it, the plaintiff, the equal protection of the law.

Plaintiff has no plain, adequate or complete remedy at law and no relief can be afforded to the plaintiff from the operation and effect of such arbitrary, confiscatory and unconstitutional actions of the defendants against the plaintiff and its property, save only in a federal court of equity, and unless such relief is granted, the property of the plaintiff will be confiscated and the plaintiff will suffer irreparable loss and injury.

Immediate and irreparable injury, loss and damage will result to plaintiff unless a temporary restraining order is granted without notice and an interlocutory injunction is granted, in this: That if the plaintiff should comply and conform with the said orders of the defendant Hyde and write its insurance at the rates of premium by him ordered and directed, namely, by making reductions as provided for in his rate orders, and if it is subsequently held by this

court that such demands, orders and requests are confiscatory or that said statutes are illegal and unconstitutional, and that operation of said statutes or the operation of said rate orders are unconstitutionally applied to the plaintiff, it will be impossible for the plaintiff ever to recover or collect from persons taking insurance with it, the plaintiff, the premiums representing the difference between the rates of premiums so collected and the rates of premiums which the plaintiff is legally entitled to charge and receive as aforesaid, which in many cases are small but are large in the aggregate, and the cost and expense of undertaking collection thereof would exceed the amounts therein respectively involved, and the said difference between the lawful rates as the same exist without application of said rate orders, and the said rates with the deductions in said rate orders applied thereto, when applied to the business by the plaintiff conducted from day to day in the State of Missouri would amount to not less than $50.00 each day, and will be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be granted by this court without notice to the defendants, because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had, in this:

If defendants receive advance notice of plaintiff's application for a temporary restraining order, the defendants will before the hearing thereon, have it within their power and they will proceed to enforce said rate reduction orders as against the plaintiff, and will in the matter of the 15% reduction order designate the class or classes to which it is to apply, and will institute a multiplicity of suits against plaintiff on each of the points aforesaid, and will proceed to revoke the licenses of plaintiff, its agents and representatives to do business in Missouri, on the alleged ground that plaintiff was not complying with said rate reduction orders.

[fol. 23] Wherefore, the premises considered, plaintiff prays:

1. That the said Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, and the said North Todd Gentry, Attorney General of the State of Mis-

souri, who are made parties defendant hereto, be summoned to appear and be required to make full and direct answer to this bill, but not under oath, answer under oath being hereby waived.

2. That it be ordered, adjudged and decreed:

(a) That Section 6283, R. S., Mo., 1919, and Section 6283 as enacted and amended in 1923, are each unconstitutional and void and contrary to and in violation of Section 1 of the 14th Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of Missouri.

(b) That the 10% rate reduction order of October 9th, 1922 made by the defendant Ben C. Hyde, and that the 15% rate reduction order of November 9th, 1923 are and each of them is, as against this plaintiff, unreasonable, confiscatory, unconstitutional and void, and they and each of them operate to deprive the plaintiff of its liberty of contract and of its property, without due process of law, and to deny to the plaintiff the equal protection of the laws, in violation of Section 1 of the 14th Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of Missouri.

(c) That the proposed action of the defendants and each of them, whereby they propose to subject the plaintiff, its directors, officers, agents, employes, or any of them, to actions for penalties or fines or imprisonment, or revocation of licenses, are in violation of the rights of the plaintiff under section 1 of the 14th Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of the State of Missouri, in that they deprive the plaintiff of its liberty of contract and of its property, without due process of law, and deny to the plaintiff the equal protection of the laws.

3. That the court make a temporary restraining order, without notice to the defendants, to be effective until the hearing upon plaintiff's application for interlocutory injunction, and that upon such hearing an interlocutory injunction issue, and that by each of said orders, namely, the temporary restraining order and the order for interlocutory injunction, the defendants Ben C. Hyde, Superintend-

ent of the Insurance Department of the State of Missouri and North Todd Gentry, Attorney General of the State of Missouri, and each of them and their deputies, attorneys, solicitors, agents, servants and representatives, and all others acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and other persons who now or shall hereafter seek or attempt to enforce the said rate reduction orders, or either of them, made by the defendant Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri on October 9th, 1922, and on November 9th, 1923, be and they are hereby restrained and enjoined from taking any proceedings whatever under or pursuant to said orders or either of them, and from enforcing or attempting to enforce or from advising, instituting, prosecuting or aiding in any action, suit or proceeding or otherwise to enforce said orders, or either of them, of the said Hyde, as aforesaid, against the plaintiff or against any of the officers, agents, or employes of the plaintiff, or against Waterworth and Terry, doing business as Missouri Inspection Bureau, an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in [fol. 24] anywise calculated to enforce or make effective said orders, which would in anywise affect the rates or the premiums or the charges of the plaintiff because of said rate orders; that said defendants and others heretofore mentioned be and they are hereby enjoined and restrained from taking any steps or proceedings whatsoever under or pursuant to such orders, or from advising, instituting, prosecuting or aiding any action, suit or proceeding of any kind or character, under the laws of the State of Missouri or otherwise in furtherance thereof, or pursuant to said statute aforesaid, or from proceeding to recover from or to impose upon or enforce against the plaintiff or any of its officers, directors, United States Manager, employees, attorneys-in-fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus, or any other persons in anywise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal to obey, observe or comply with said orders or either of them, or any of the terms, commands, or requirements thereof, or from making any direction respecting application thereof, or from

proceeding against plaintiff, its agents, or employes, in anywise because of exaction of premiums by the plaintiff, at rate level unaffected by the said rate orders, or because of the delivery of policies specifying such rates or from interfering with or attempting to interfere with, or from advising, instituting, prosecuting or aiding in any action, suit, or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employes from charging, receiving or collecting the rates of premium charged for insurance, which would be lawful except for said rate orders.

That the defendants be restrained and enjoined from in anywise proceeding under, enforcing or taking any action whatsoever under or pursuant to or authorized by Section 6287 R. S. Mo., 1919, or said section as amended; that said defendants be restrained and enjoined from revoking the license of the plaintiff or any of its agents or representatives and from refusing to renew license of the plaintiff or any of its agents or representatives, or withholding the same, upon the ground of supposed violation by them, or any of them, of the said statutes or rate orders or any of them, above referred to.

That the interlocutory injunction above prayed for, issue against defendants upon five (5) days' notice to them and to the Honorable Sam A. Baker, Governor of Missouri, respectively, of the intended application therefor, enjoining and restraining the defendants as above prayed, pending the hearing of this cause and until the further order of this court, and that such hearing be had before three judges as is by statute prescribed in such cases; that a temporary restraining order may be issued as above prayed, without notice, to be effective until the date to be set by the court and until hearing of application for temporary or interlocutory injunction; that upon final hearing in this cause, which the plaintiff prays may also be had before three judges as provided by law, and that said interlocutory injunction shall be made permanent, and that the Court grant plaintiff such other and further relief as to the Court may seem just and proper; and that plaintiff recover of defendant its costs herein.

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff, by John S. Leahy, Solicitor.

[fols. 25 & 26] *Duly sworn to by Paul W. Terry. Jurat omitted in printing.*

[fol. 27] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed Feb. 14, 1928

Now, on this 14th day of February, 1928, comes the plaintiff herein and files and presents to the undersigned, judge of this court, its verified bill wherein it is prayed that a temporary restraining order issue against the defendants, and each of them, as in said bill prayed.

And the court finds, from the allegations of said verified bill as follows:

Immediate and irreparable injury, loss and damage will result to plaintiff unless a temporary restraining order is granted without notice and an interlocutory injunction is granted, in this: That if the plaintiff should comply and conform with the rate orders of the defendant Hyde in the bill set forth and write its insurance at the rates of premium by him ordered and directed, namely, by making reductions as provided for in his rate orders, and if it is subsequently held by this court that such demands, orders and requests are confiscatory or that said statutes are illegal and unconstitutional, and that operation of said statutes or the operation of said rate orders are unconstitutionally applied to the plaintiff, it will be impossible for the plaintiff ever to recover or collect from persons taking insurance with plaintiff, the premiums representing the difference between the rates of premiums so collected and the rates of premiums which the plaintiff is legally entitled to charge and receive, which in many cases are small but are large in the aggregate, and the cost and expense of undertaking collection thereof would exceed the amounts therein respectively involved, and the said difference between the rates as the same exist without application of said rate orders, and the said rates with the deductions in said rate orders applied thereto, when applied to the business by the plaintiff conducted from day to day in the State of Missouri would amount to not less than $50.00 each day, and will be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be granted by this court without notice to the de-

fendants, because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had, in this:

[fol. 28] If defendants receive advance notice of plaintiff's application for a temporary restraining order, the defendants will before the hearing thereon, have it within their power and they will proceed to enforce said rate reduction orders as against the plaintiff, and will in the matter of the 15% reduction order designate the class or classes to which it is to apply, and will institute a multiplicity of suits against plaintiff on each of the points aforesaid, and will proceed to revoke the licenses of plaintiff, its agents and representatives to do business in Missouri, on the alleged ground that plaintiff was not complying with said rate reduction orders.

And the court finds that the plaintiff is entitled to a temporary restraining order as prayed, and that immediate and irreparable injury and damage will result to the plaintiff before notice can be served and a hearing had unless such temporary restraining order shall issue without notice, according to the prayer of the bill;

Now, Therefore, it is by the Court ordered that until the 21st day of February, 1928 (unless within that time this Court otherwise orders) and during the period of extension of this order if it shall be extended, the defendants Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri and North Todd Gentry, Attorney General of the State of Missouri, and each of them and their deputies, attorneys, solicitors, agents, servants and representatives and all others acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and other persons who now or shall hereafter seek or attempt to enforce the said rate reduction orders, or either of them, made by the defendant Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri on October 9th, 1922, and on November 9th, 1923, be and they are hereby restrained and enjoined from taking any proceedings whatever under or pursuant to said orders or either of them, and from enforcing or attempting to enforce or from advising, instituting, prosecuting or aiding in any action, suit or proceeding or otherwise to enforce said orders, or either of them, of the said Hyde, as aforesaid, against the plaintiff or against any of the offi-

cers, agents, or employes of the plaintiff, or against Waterworth and Terry, doing business as Missouri Inspection Bureau, an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in anywise calculated to enforce or make effective said orders, which would in anywise affect the rates or the premiums or the charges of the plaintiff because of said rate orders; that said defendants and others heretofore mentioned be and they are hereby enjoined and restrained from taking any steps or proceedings whatsoever under or pursuant to such orders, or from advising, instituting, prosecuting or aiding any action, suit or proceeding of any kind or character, under the laws of the State of Missouri or otherwise in furtherance thereof, or pursuant to said statute aforesaid, or from proceeding to recover from or to impose upon or enforce against the plaintiff or any of its officers, directors, United States Manager, employees, attorneys-in-fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus, or any other persons in anywise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal to obey, observe or comply with said orders or either of them, or any of the terms, commands, or requirements thereof, or from making any direction respecting application thereof, or from proceeding against plaintiff, its agents or employes, in anywise because of exaction of premiums by the plaintiff, at rate level unaffected by the said rate orders, or because of the delivery of policies specifying such rates or from interfering with or attempting to interfere with, or from advising, instituting, prosecuting or aiding in any action, suit, or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employes from charging, receiving or collecting the rates of premium charged for insurance, which would be lawful except for said rate orders.

That the defendants be restrained and enjoined from in anywise proceeding under, enforcing or taking any action whatsoever under or pursuant to or authorized by Section 6287 R. S. Mo., 1919, or said section as amended; that said defendants be restrained and enjoined from revoking the license of the plaintiff or any of its agents or representatives and from refusing to renew license of the plaintiff or any of its agents or representatives, or withholding the

same, upon the ground of supposed violation by them, or any of them, of the said statutes or rate orders or any of them, above referred to.

Provided, however, that plaintiff shall file herein its bond in the penal sum of $2,000, in form and with security to be approved by this Court, or the undersigned, judge thereof, conditioned for the payment of such costs and damages as may be incurred or suffered by any party wrongfully enjoined or restrained by this temporary restraining order.

And now comes plaintiff and forthwith presents for filing its said bond, as so above required, which said bond and the surety thereon appearing are by the Court hereby approved.

It is further ordered that a copy of this order, duly certified by the Clerk, be served upon the defendants.

Merrill E. Otis, Judge.

[fols. 29 & 30] UNITED STATES OF AMERICA,
Central Division of the
Western District of Missouri, sct:

I hereby certify that I served the within temporary restraining order in Jefferson City, Missouri, on the 15th day of February, 1928, by delivering a copy thereof, duly certified by the clerk, to North Todd Gentry, Attorney General of the State of Missouri, and to A. J. Rathbun, Deputy Superintendent of the Insurance Department of the State of Missouri, the Superintendent of said Insurance Department being absent from the Central Division of the Western District of Missouri.

Asa W. Butler, United States Marshal, by Anton B. Richter, Deputy Marshal.

Marshal's Fees: 2 Services, $4.00.

UNITED STATES OF AMERICA, sct:

I, Edwin R. Durham, Clerk of the United States District Court for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a true and complete copy of the Marshal's Return on the Temporary Restraining Order in the case wherein National Fire Insurance Company of Hartford is plaintiff and Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, et al., are defendants.

The Clerk of the Supreme Court of the United States or the Attorney for the Appellant is authorized to attach the above copy of the return to the transcript heretofore prepared by me in the above cause.

Witness my hand as Clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 20th day of May, A. D. 1929.

Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy. (Seal of the United States District Court of Missouri, Western Division, Western District.)

[Endorsed:] No. 91. United States District Court for the Central Division of Western District of Missouri. National Fire Insurance Co., of Hartford, Plaintiff, vs. Ben C. Hyde, Superintendent of Insurance Department of State of Missouri, and North Todd Gentry, Attorney General for the State of Missouri, Defendants. Temporary restraining order. Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

[fols. 31 & 32] Cost bond on restraining order for $2,000, approved and filed February 14, 1928, omitted in printing.

[fols. 33 & 34] In United States District Court

Order Continuing Restraining Order—Filed Feb. 21, 1928

Now on this 20th day of February, 1928, the court finds that the hearing of the application for interlocutory injunction herein has been tentatively set for February 21, 1928, and that it is impossible for three judges to convene to hear said application before March 10, 1928; and for that reason it is by the court ordered that the hearing of said application be and the same is continued until ten o'clock A. M. on said last named date; and it is by the court further ordered that the temporary restraining order issued herein be and the same is hereby continued in full force and effect until the hearing and determination of said application for interlocutory injunction; and that the clerk notify the parties accordingly.

Merrill E. Otis, Judge.

[fol. 35] IN UNITED STATES DISTRICT COURT

APPLICATION TO DISQUALIFY JUDGE MERRILL E. OTIS—Filed Mar. 10, 1928

Come now the defendants in the foregoing cause and state that the within suit was filed before and in the court of the Honorable Merrill E. Otis, District Judge of the United States District Court for the Central Division of the Western District of Missouri; that said Judge Otis is a material witness for the defendants herein in the trial of this cause, in that said Judge Otis, in January 1922, as Assistant Attorney-General of the State of Missouri, represented the defendant, Ben C. Hyde as counsel in the making of a certain stipulation by and between the said defendant Hyde and this plaintiff, whereby said plaintiff, for certain valuable considerations, agreed not to bring an injunction suit to restrain the operation of certain reduction order in the matter of fire insurance rates to be made by said defendant Hyde in the State of Missouri, and that said plaintiff would not attack the constitutionality of Section 6283 and 6384 of the statutes of the State of Missouri, constituting the so-called Fire Insurance Rating Act of said state; that defendants expect to use said Judge Otis as a witness for the purpose of establishing the execution of said stipulation and the facts and circumstances surrounding the making of same.

Wherefore your applicants herein, being the defendants in the foregoing cause, pray the court that the facts as hereinbefore set out, namely that said Judge Otis is a material witness for the defendants herein, and the matters and things about which he will be called upon to testify at the trial of this cause, be entered on the records of this court and that this court make an order that an authenticated copy of said record shall be forthwith certified to the Senior Circuit Judge of the United States Circuit Court of Appeals, Eighth Circuit.

North T. Gentry, Arthur M. Hyde, John T. Barker, Floyd E. Jacobs.

Duly sworn to by Floyd E. Jacobs. Jurat omitted in printing.

[fol. 36] IN UNITED STATES DISTRICT COURT

ORDER CERTIFYING APPLICATION TO DISQUALIFY *to* SENIOR CIRCUIT JUDGE—Filed Mar. 10, 1928

Now on this 9th day of March, 1928 the defendants by and through their counsel, file their application to this court in the foregoing cause and in all similar cases now pending in this court and being numbered 64 to 211 inclusive, for an order finding that Merrill E. Otis, the District Judge of the Western District of Missouri, is a material witness in the above entitled cause for the defendants herein, and for that reason is disqualified to set in a trial or any hearing in which matters and controversies are to be determined by and between the plaintiff and the defendants herein.

Therefore said application is by the court taken up and heard and determined, and the court finds from said application that he is to be called by the defendants as a witness for the defendants herein and in all cases pending in this court, being numbered from 64 to 211 inclusive, and for that reason is disqualified to sit in any hearings, matters, or controversies to be determined between said parties. It is further ordered that this fact be entered on the records of this court in cases numbered 64 to 211 inclusive and that an authenticated copy thereof and relating to the cases pending in this court number 64 to 211 inclusive be forthwith certified to the senior Circuit Judge of this Circuit.

Merrill E. Otis, Judge of the U. S. District Court for the Western District of Missouri.

[fols. 37 & 38] IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING HONORABLE ALBERT L. REEVES—Filed Mar. 24, 1928

Whereas, Honorable Merrill E. Otis is a material witness for the defendants in the case above entitled and in similar cases numbered 64 to 211, inclusive, which are pending in the United States District Court of the Central Division of the Western District of Missouri, and Honorable Merrill E. Otis has caused that fact to be entered on the records of the court and also an order that an authenticated copy

thereof shall be forthwith certified to the senior circuit Judge of this circuit present therein, and whereas the undersigned has received such authenticated copy of that order and of the other orders above mentioned,

Now, therefore, I do by these presents designate and appoint Honorable Albert L. Reeves, United States District Judge of the Western District of Missouri, to hear, try and dispose of the case above entitled and the similar cases pending in the court above named, numbered from 64 to 211, inclusive, and to make such orders, decisions, judgments and other directions as in his opinion shall be just. And Honorable Albert L. Reeves is hereby vested with all the authority, power and jurisdiction in the United States District Court for the Western District of Missouri in these cases that the Honorable Merrill E. Otis would have had if he had not been disqualified.

In witness whereof I have hereunto set my hand and seal this twenty-first day of March, 1928.

Walter H. Sanborn, Senior Circuit Judge Eighth Circuit.

[fol. 39] In United States District Court

Amendment to Bill of Complaint—Filed Mar. 29, 1928

Comes now plaintiff, by its solicitors, and by leave of Court first had and obtained amends its bill in equity herein, namely, by insertion immediately after paragraph 21 of the third division of said bill, and immediately preceding the fourth division of said bill, the following:

"Par. 21½. Plaintiff further avers that after the making of the order of the defendant Hyde, of date October 9, 1922, this plaintiff did not, nor did any other person for it, nor did any other stock fire insurance company doing business in Missouri, within thirty days thereafter or at any other time, designate classes to which the same should apply, and thereupon said Superintendent of the Insurance Department of the State of Missouri did not designate any class or classes of insurance to which the same should be applied by plaintiff or other stock companies at any time prior to February 1, 1928.

And plaintiff avers that, in the period of more than five years intervening, great changes occurred and took place in the insurance experience in the State of Missouri, both as respects this plaintiff and stock fire insurance companies generally in said state, as respects their profit or loss in the state, in that the losses of the plaintiff upon its business of insurance in said state and upon each of such affected classes, namely, fire, lightning, hail and windstorm, were and each of them was materially worse than before that time; and the losses therein were in much greater proportion of premiums than theretofore; and the said defendant, Superintendent, did not have any hearing, or make any investigation, or give any notice to plaintiff prior to making his said designation of classes; wherefore plaintiff says that by the failure of the said defendant to make any designation of classes as by statute provided, namely, with promptness after the expiration of thirty days from said order, and by permitting and allowing the same to remain without change for period of more than five years, thereby the defendant lost all power to make any designation of classes or to make said rate order effective or to revive the same or so to do without any notice or hearing; wherefore the plaintiff says that said effort to make said rate order effective by such designation of classes is void and without power in him, the said defendant.

[fol. 40] And plaintiff further avers that the other of said rate orders of the defendant aforesaid, namely, that of November 9, 1923, has not been by the said defendant Superintendent at any time made effective, nor any classes designated to which the same should apply; nor has plaintiff, nor any other fire insurance company in the state, made such designation; wherefore the plaintiff says that no power exists in the defendant Superintendent to make any classification and his said rate order has by such failure of designation become and remains a nullity, and that no power exists or remains in the said defendant to enforce or effectuate the same.

And plaintiff further avers that notwithstanding the want of power of the said defendant Superintendent, and notwithstanding the complete nullity of his said rate orders, by failure to enforce or make effective or designate classes thereunder within any reasonable period after the entry of

the same; yet the defendants, notwithstanding, threaten, and unless restrained will claim vitality in said respective rate orders, that the same are binding and bound to be observed by it, the plaintiff."

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

Duly sworn to by Paul W. Terry. Jurat omitted in printing.

[fols. 41 & 42] IN UNITED STATES DISTRICT COURT

AMENDMENT TO BILL OF COMPLAINT—Filed Mar. 29, 1928

Comes now plaintiff in the above entitled cause, and by leave of Court, first had and obtained, amends its Bill in Equity, by inserting therein on page 7 thereof, in paragraph 11, immediately following the second tabulation therein appearing, the following:

"In the year 1927, the total income and outgo of this plaintiff on its business of insurance in Missouri were as follows:

Income (Earned premiums)	$733,038
Outgo (Incurred Losses and Expenses)	909,089
Loss	$176,051"

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

Duly sworn to by D. J. Gallagher. Jurat omitted in printing.

[fol. 43] IN UNITED STATES DISTRICT COURT

APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed April 11, 1928

Now comes the plaintiff in the above entitled cause and respectfully shows to the Court that plaintiff has filed herein its verified bill, wherein it prays for an interlocutory

injunction against the defendants. And now upon the facts alleged in said verified bill the plaintiff moves and prays the Court to issue herein an interlocutory injunction, to remain in full force and effect until final hearing, determination and decree herein; and that by said interlocutory injunction, the defendants Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri and North Todd Gentry, Attorney General of the State of Missouri, and each of them and their deputies, attorneys, solicitors, agents, servants and representatives, and all others acting or claiming or assuming to act for or under the authority or in the name of said defendants, or either of them, and all other persons who now or shall hereafter seek or attempt to enforce the said rate reduction orders, or either of them, made by the defendant Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri on October 9th, 1922, and on November 9th, 1923, be restrained and enjoined until final hearing and decree herein, or until otherwise ordered by this Court, from taking any proceedings whatever under or pursuant to said rate reductions or either of them, and from enforcing or attempting to enforce and from advising, instituting, prosecuting or aiding in any action, suit or proceeding or otherwise to enforce said orders, or either of them, of the said Hyde, as aforesaid, against the plaintiff or against any of the officers, agents, or employes of the plaintiff, or against Waterworth and Terry, doing business as Missouri Inspection Bureau, an agency of the plaintiff; and from giving or enforcing any orders or directions to said Missouri Inspection Bureau in anywise calculated to enforce or make effective said orders, which would in anywise affect the rates or the premiums or the charges of the plaintiff because of said rate orders; and from taking any steps or proceedings whatsoever under or pursuant to such orders; and from advising, instituting, prosecuting or aiding any action, suit or proceeding of any kind or character, under the laws of the State of Missouri or otherwise in furtherance thereof, or pursuant to said statute aforesaid; and from proceeding to recover from or to impose upon or enforce against the plaintiff or any of its officers, directors, United States Manager, employees, attorneys-in-fact, agents, adjusters, inspectors, rating bureaus, inspection

bureaus, or any other persons in anywise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal to obey, observe or comply with said orders or either of them, or any of the terms, commands, or requirements thereof; and from making any direction respecting application thereof; and from proceeding against plaintiff, its agents, or employes, in anywise because of exaction of premiums by the plaintiff, at rate level unaffected by the said rate orders, or because of the delivery of policies specifying such rates; and from interfering with or attempting to interfere with, and from advising, instituting, prosecuting or aiding in any action, suit, or pro- [fols. 44 & 45] ceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employes from charging, receiving or collecting the rates of premium charged for insurance, which would be lawful except for said rate orders; and from in anywise proceeding under, enforcing or taking any action whatsoever under or pursuant to or authorized by Section 6287 R. S. Mo., 1919; and from revoking the license of the plaintiff or any of its agents or representatives; and from refusing to renew license of the plaintiff or any of its agents or representatives, or withholding the same, upon the ground of supposed violation by them, or any of them, of the said statutes or rate orders or any of them, above referred to.

Plaintiff has given more than five days' notice of the hearing upon plaintiff's application for interlocutory injunction herein, to the Governor of the State of Missouri and to the defendants herein, and each of them. And plaintiff prays that its application for said interlocutory injunction be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, as by statute prescribed in such cases.

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff, by William S. Hogsett, Solicitor.

[fol. 46] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS OR STAY UNLESS RESTITUTION BE MADE—Filed April 18, 1928

Now at this date come the defendants and ask the court to dismiss or stay the temporary restraining order heretofore issued in this cause for the following reasons:

First, because on the 9th day of October, 1922, the Insurance Department of Missouri ordered a ten per cent reduction of insurance rates against fire, lightning, hail and windstorm insurance companies doing business in Missouri, effective November 15th, 1922; and thereafter and before such reduction went into effect the same was suspended by all of the fire insurance companies doing business in Missouri upon their filing a petition for review in the Circuit Court of Cole County; thereafter a referee was appointed and a complete and full hearing on the merits was held and the referee found against the state and held that such reduction was improper and confiscatory; thereafter such finding of the referee was by the Circuit Court of Cole County sustained; thereafter upon appeal to the Supreme Court of Missouri the reduction so made was in every way sustained and the action of the Insurance Department upheld; thereafter by certiorari the case was taken to the Supreme Court of the United States and after being fully briefed, argued and presented, that court refused to interfere with the judgment and decision of the Supreme Court of Missouri and allowed such reduction order to remain in effect.

Second, because a stipulation was entered into between all of such insurance companies and the Insurance Department of Missouri whereby it was agreed that if such insurance companies be allowed, and they were, to collect the full rate, instead of such reduced rate, they would not appeal to any court for an injunction preventing such reduction order from going into effect; and would not assail the constitutionality of the Missouri Rating Act, and *and* [fol. 47] that pending such review such insurance companies would execute a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected if such reduction order was finally sustained by a court of

last resort, and would make restitution, that part of the stipulation being as follows:

"That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

"That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

"That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney General; Merrill E. Otis, Asst. Atty. Gen'l, Attorneys for the Defendant."

Third, because the reduction order having been sustained by the Supreme Court of Missouri and undisturbed by the Supreme Court of the United States, it is the duty of such insurance companies to make restitution to such policyholders of every sum collected from them in excess of the reduced rate; that restitution has not been made and that such companies only put up bonds aggregating one million dollars and have retained more than twelve million dollars from policyholders in Missouri, which by law and stipulation they should be compelled to return.

[fol. 48] Fourth, because all of the issues in this cause were fully presented and litigated in the hearing aforesaid before the Supreme Court of Missouri and the Supreme Court of the United States, and are now res adjudicata and there is nothing left for plaintiffs and these other insurance companies to do but to make restitution.

Fifth, because the fifteen per cent reduction order referred to by plaintiffs made by the Insurance Department on the 9th day of November, 1923, was cancelled and set aside by such Department on the 12th day of April, 1928, and is no longer in force and effect.

Wherefore defendants pray an order of this court either dismissing this proceeding or staying same until plaintiffs and all other fire insurance companies affected by such reduction order have made full and complete restitution to each and every policyholder in Missouri of each and every sum collected in excess of such ten per cent reduction.

Respectfully submitted.

North Todd Gentry, Attorney General of Missouri,
Arthur M. Hyde, John T. Barker, Floyd E. Jacobs,
Attorneys for Defendants.

Duly sworn to by Floyd E. Jacobs. Jurat omitted in printing.

[fol. 49] In United States District Court

Motion to Dismiss or Stay Unless Bond is Filed—Filed April 18, 1928

Now at this date come the defendants and ask the court to dismiss or stay the temporary restraining order heretofore issued in this cause for the following reasons:

First, because on the 9th day of October, 1922, the Insurance Department of Missouri ordered a ten per cent reduction of insurance rates against fire, lightning, hail and windstorm insurance companies doing business in Missouri, effective November 15th, 1922 and thereafter and before such reduction went into effect the same was suspended

by all of the fire insurance companies doing business in Missouri upon their filing a petition for review in the Circuit Court of Cole County; thereafter a referee was appointed and a complete and full hearing on the merits was held and the referee found against the State and held that such reduction was improper and confiscatory; thereafter such finding of the referee was by the Circuit Court of Cole County sustained; thereafter upon appeal to the Supreme Court of Missouri the reduction so made was in every way sustained and the action of the Insurance Department upheld, 315 Mo. 113; thereafter by certiorari the cause was taken to the Supreme Court of the United States and after being fully briefed, argued and presented, that court refused to interfere with the judgment and decision of the Supreme Court of Missouri and allowed such reduction order to remain in effect, 48 Sup. Ct. Rep. 174.

Second, because a stipulation was entered into between all of such insurance companies and the Insurance Department of Missouri whereby it was agreed that if such insurance companies be allowed, and they were, to collect the full rate, instead of such reduced rate, they would not apply to any court for an injunction preventing such reduction order from going into effect; and would not assail the constitutionality of the Missouri Rating Act, and that pending such review such insurance companies would execute [fol. 50] a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected if such reduction order was finally sustained by a court of last resort, that part of the stipulation being as follows:

"That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

"That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause

in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

"That in such matter the questions of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney General; Merrill E. Otis, Asst. Atty. Gen'l, Attorneys for the Defendant."

Third, because the reduction order having been sustained by the Supreme Court of Missouri and undisturbed by the Supreme Court of the United States, it is the legal duty of such insurance companies to make restitution to such policyholders of every sum collected from them in excess of the reduced rate; that restitution has not been made and that such companies only put up bonds aggregating one million dollars and have retained more than twelve million dollars from policyholders in Missouri, which by law and [fol. 51] stipulation they should be compelled to return.

Fourth, because these insurance companies failed and refused to execute and file a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected in violation of their stipulation and the law, but only executed and filed a bond for one million dollars, although actually collecting and retaining money belonging to policyholders in Missouri in excess of twelve million dollars; that before these insurance companies be allowed to litigate these same matters with the State in this court they should be compelled to execute at this time a bond or bonds in excess of twelve million dollars agreeing to return to the policyholders of Missouri all sums collected in excess of the ten per cent reduction order in case this and other courts finally decide against them.

Fifth, because if these insurance companies do not make restitution or file a bond or bonds sufficient to protect such

policyholders there will be thousands of persons having claims against these companies involving the same questions, and exactly of a similar nature, and a great multiplicity of suits will arise and such policyholders will be denied any substantial relief; so that, in addition to executing and filing such bond or bonds for the benefit of such policyholders, these companies should at this time be required to file in this court the name of every policyholder from whom they have collected these excessive rates since such reduction order went into effect on the 9th day of November, 1922, and, in addition thereto, the total amount of premiums paid by every policyholder, together with the name of the company collecting such excess premiums, in order that such policyholders may receive their money back in case the insurance companies ultimately lose.

Sixth, because the fifteen per cent reduction order referred to by plaintiffs made by the Insurance Department [fols. 52 & 53] on the 9th day of November, 1923, was cancelled and set aside by such department on the 12th day of April, 1928, and is no longer in force and effect.

Wherefore defendants pray an order of this court either dismissing this proceeding or staying the same until plaintiffs, and all other fire insurance companies affected by such reduction order and having cases pending in this court, execute a bond or bonds sufficient in amount to return to all policyholders all excess premiums collected if such reduction order is finally sustained by this and other courts and, in addition thereto, that they file in this court the name of every policyholder from whom they have collected such excessive rates since the ten per cent reduction order went into effect on the 9th day of November, 1922, together with the amount of premium paid by each policyholder and the company to whom paid, and such other information as this court shall deem necessary in order that such policyholders may eventually receive back such excess premiums so paid by them.

Respectfully submitted.

North Todd Gentry, Attorney General of Missouri;
Arthur N. Hyde, John T. Barker, Floyd E. Jacobs,
Attorneys for Defendants.

Duly sworn to by Floyd E. Jacobs. Jurat omitted in printing.

[fol. 54] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed April 18, 1928

Now at this date come the defendants and ask the court to set aside the temporary restraining order heretofore issued without notice in this cause and to dismiss this proceeding for the following reasons:

First, because upon the face of plaintiffs' petition plaintiffs are not entitled to the relief asked for.

Second, because on October 9th, 1922, the Insurance Department of Missouri ordered a reduction of ten per cent of fire insurance rates in Missouri, effective November 15th, 1922, and thereafter this plaintiff and all other fire insurance companies doing business in the State filed a petition for review in the Circuit Court of Cole County, Missouri, and upon the appointment of a referee a full and complete trial and hearing upon the merits was held and the referee found the issues for the insurance companies and against the Insurance Department and ordered such reduction set aside. Thereafter such finding of the referee was sustained by the Circuit Court of Cole County, Missouri; thereafter on appeal to the Supreme Court of Missouri the finding of the referee and of the Circuit Court of Cole County was set aside and the reduction order was sustained in every particular, and the action of the Insurance Department in making such ten per cent reduction was approved and sustained, 315 Mo. 113; thereafter by certiorari the cause was taken to the Supreme Court of the United States and such court refused to disturb the judgment and finding of the Missouri Supreme Court and allowed same to remain in full force and effect. 48 Sup. Ct. Rep. 174.

Third, because plaintiffs and all other such insurance companies have had their day in court; have litigated this identical question now before the court and the matter is res adjudicata on each and every point now raised and cannot again be litigated by this honorable body.

[fol. 55] Fourth, because plaintiffs and these other insurance companies entered into a stipulation whereby in the event they were allowed to collect the full premium, and

not put into effect such reduction, they agreed that would not ask for an injunction in any court, and would not assail the constitutionality of the Missouri Rating Act, and that they are estopped to now ask for an injunction in this court. Such stipulation, in so far as pertinent, is as follows:

"That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

"That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

"That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney General; Merrill E. Otis, Asst. Attorney Gen'l, Attorneys for Defendants."

Fifth, because in this proceeding plaintiffs and all other fire insurance companies in Missouri are asking a review of the decision of the Supreme Court of Missouri and this [fol. 56] court is without jurisdiction to review the final decision of the Supreme Court of Missouri, particularly so where the Supreme Court of the United States refused to disturb such judgment and finding.

Sixth, because the fifteen per cent reduction order referred to by plaintiffs made by the Insurance Department on the 9th day of November, 1923, was cancelled and set aside by such Department on the 12th day of April, 1928, and is no longer in force and effect.

Wherefore defendants pray that the temporary restraining order heretofore issued be set aside and this proceeding dismissed with costs.

Respectfully submitted.

North Todd Gentry, Attorney General of Missouri; Arthur M. Hyde, John T. Barker, Floyd E. Jacobs, Attorneys for Defendants.

Duly sworn to by Floyd E. Jacobs. Jurat omitted in printing.

[fol. 57] IN UNITED STATES DISTRICT COURT

STIPULATION TO TRANSFER TO WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI—Filed April 25, 1928

In accordance with Section 119 of Chapter 4 of Title 28 of United States Code, it is hereby stipulated and agreed by and between the parties in each of the above causes that each of said causes may be forthwith transferred to the United States District Court for the Western Division of the Western District of Missouri, and that an order may be forthwith made accordingly.

Robert J. Folonie, John S. Leahy, Ashley Cockrill, William S. Hogsett, Solicitors for Plaintiff in Each of Above Causes. North Todd Gentry, Arthur M. Hyde, Floyd E. Jacobs, John T. Barker, Solicitors for Defendants in Each of Above Causes.

[fol. 58] IN UNITED STATES DISTRICT COURT

ORDER TO TRANSFER TO WESTERN DIVISION OF WESTERN DISTRICT OF MISSOURI—Filed April 25, 1928

Now on this 25th day of April, 1928, in each of the above causes come the parties and file their stipulation agreeing

that each of said causes may forthwith be transferred to the Western Division of the Western District of Missouri.

Now, therefore, it is hereby ordered that each cause above named be and the same is hereby transferred to the United States District Court for the Western Division of the Western District of Missouri.

Albert L. Reeves, Judge.

[fols. 59 & 60] In United States District Court

Order Substituting Parties Defendant—Filed April 13, 1929

On suggestion of counsel and by consent of all parties in open court, Joseph B. Thompson, successor in office of Ben C. Hyde, Superintendent of Insurance, and Stratton Shartel, successor in office of North Todd Gentry, Attorney General, are substituted as defendants in each of the above actions for Ben C. Hyde and North Todd Gentry, in their designated official capacities, without prejudice to the rights of any party or change in the present status of any of the above cases.

Entered this 13th day of April, 1929.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

[fols. 61 & 62] In United States District Court

Order Denying Application for Temporary Injunction—Filed April 13, 1929

It is ordered and decreed that

1. To obviate the necessity of cumbering the records with a separately signed order in each of the above cases, this order is made to apply and be in each of such cases with the same effect as though separately made in each individual case.

2. The restraining orders now in force are so continued until and including May 15, 1929.

3. The application for a temporary injunction be denied and such injunction denied, without prejudice to any plaintiff to renew such application upon showing that it has repaid the excess of ten per centum collected on premiums for fire, lightning, hail and windstorm insurance on Missouri business since November 15, 1922, and up to the date of the renewal of such application.

Entered April 13, 1929.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

[fol. 63] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 26, 1929

To the Honorable Kimbrough Stone, Circuit Judge; Honorable Albert L. Reeves, District Judge; Honorable Franklin Kennamer, District Judge:

The above named National Fire Insurance Company of Hartford, feeling aggrieved by the order of the court denying, after notice and hearing, an interlocutory injunction prayed by plaintiff in the above entitled cause, rendered and entered in said cause on the 13th day of April, A. D. 1929, does hereby appeal from said order to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree is so based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said court in such cases made and provided.

[fol. 64] And your petitioner further prays that the proper order relating to the required security to be required of it be made.

National Fire Insurance Company of Hartford, by Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Its Solicitors.

Appeal pursuant to above petition allowed upon giving bond as required by law in the sum of Five Hundred dol-

lars and bond being now presented with satisfactory surety in the amount so directed such bond is hereby approved and ordered filed.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

[fol. 65] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed April 26, 1929

Comes now National Fire Insurance Company of Hartford, plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the order made by this honorable court on the 13th day of April, 1929, denying the application of the plaintiff for an interlocutory injunction:

I

The United States District Court for the Western Division of the Western District of Missouri erred in overruling and denying the application of the plaintiff for an interlocutory injunction.

II

Said District Court erred in imposing terms and conditions for hearing and considering said application of the plaintiff which are unlawful, oppressive, and in particular, in imposing as a condition for consideration and renewal [fol. 66] of said application a showing that the plaintiff has repaid the excess of ten per centum collected on premiums for fire, lightning, hail and windstorm insurance on Missouri business since November 15, 1922, and up to the date of the renewal of such application.

III

That the said District Court erred in that, in its opinion and in its said order, it has affixed and adopted a date as respects which a supposed duty of repayment is incumbent

upon the plaintiff, as of November 15, 1922, whereas there is no warrant for the court to adopt and affix any date as respects repayment or restitution, if any, prior to February 1, 1928.

IV

That the District Court erred in giving consideration upon such application for interlocutory injunction to matters not proper to be considered in such interlocutory application but which matters ought to have been reserved to the final hearing of said cause, and in particular as respects the supposed stipulation mentioned in the court's opinion and the compliance or non-compliance of the parties therewith, whether or not the Superintendent proceeded pursuant thereto, and the binding force and effect and mutual character thereof.

V

That the District Court erred in weighing and undertaking to determine the scope, nature and extent of review proceedings in the state courts and the effect and application of the stipulation thereto, upon bare allegations in affidavits, which the court ought properly to have reserved for disposition only on the final hearing of the cause.

[fol. 67]

VI

That the District Court erred in seeking to apply the doctrine of estoppel as against the plaintiff upon an issue not presented by any pleadings of the defendants and upon a matter of affirmative defense not presented in any pleading by defendants and the detail whereof ought to have been reserved for determination upon final hearing.

VII

That the District Court erred in coming to conclusions against the plaintiff upon the questions of want of consideration and lack of mutuality in the stipulation, whereas it was shown upon the hearing that irreparable injury would result to the plaintiff if interlocutory injunction was not granted, and whereas the balance of injury as against

the plaintiff would be much greater upon a denial of interlocutory injunction than any possible damage which might result to the defendants if the same were granted.

VIII

That the District Court erred in construing the said stipulation as applicable to the case at bar and not confined to former proceedings not here involved and in so doing came to conclusions upon matters upon inadequate knowledge of the facts which ought to have been reserved for consideration upon final hearing.

IX

That the District Court erred in applying the principle that plaintiff was barred by the doctrine that it came into a court of equity with unclean hands, whereas such matters were in no wise established upon the evidence nor was [fol. 68] shown as to warrant the court in denying the application of the plaintiff for an interlocutory injunction.

X

The District Court erred in ruling that if repayments be made by the plaintiff and no interlocutory injunction be granted that although "it is probable that such recovery would be impossible or at any rate highly improbable," namely recovery from policy holders to whom rebates might be paid, in the absence of an interlocutory injunction, that nevertheless the court held "but such result is no reason for granting the injunctions."

XI

The District Court erred in rejecting the claims of the plaintiff that Section 6283, Revised Statutes of Missouri, 1919, as construed by the Supreme Court of Missouri, under the admitted allegations of the Bill of Complaint, is an unconstitutional invasion of the rights of the plaintiff in the particulars alleged in the Bill of Complaint.

XII

The District Court erred in declining and refusing to hold the rate order of October 9, 1922, complained of under

the admitted allegations of the Bill of Complaint to be an unconstitutional invasion of the rights of the plaintiff as such constitutional invasions are alleged and set forth in the Bill of Complaint.

XIII

The District Court erred in holding that earned premiums, incurred losses and incurred expenses form an improper measurement of profit or loss and erred in adopting [fol. 69] and approving the basis of premiums received less losses and expenses paid.

XIV

The District Court erred in holding that it was not an invasion of the constitutional rights of plaintiff in that the Superintendent adopted an arbitrary and unreasonable method of affixing his rate change, and in particular in his use of the basis of premiums received and losses and expenses paid and in that he took into account the earnings of the plaintiff and its competitors from investments in affixing and making an order of reduction of rates on underwriting.

Wherefore appellant prays that said order of April 13, 1929, denying the application of the plaintiff for an interlocutory injunction be reversed and that said District Court for the Western Division of the Western District of Missouri be directed to enter an order reversing its decision upon such application and to grant an interlocutory injunction according to the prayer of the application therefor.

Robert J. Folonie, William S. Hogsett, John L. Leahy, Ashley Cockrill, Solicitors for Appellant.

[fol. 70] In United States District Court

Order Allowing Appeal—Filed April 26, 1929

On petition for appeal now filed by plaintiff, appearing by its solicitors, it is hereby ordered that an appeal to the Supreme Court of the United States from the order of

above named District Court denying, after notice and hearing, an interlocutory injunction prayed by plaintiff in said cause, be and the same is hereby allowed; and that a certified transcript of the record, testimony, exhibits and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars, and said bond being now presented with satisfactory surety in the amount so directed, is hereby approved by the court and ordered filed.

Dated April 26th, 1929.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

[fols. 71-73] Cost bond on appeal for $500.00, approved and filed April 26, 1929, omitted in printing.

[fol. 74] In United States District Court

Appellant's Præcipe for Record—Filed April 29, 1929

To Edwin R. Durham, clerk of the above court:

National Fire Insurance Company of Hartford, having filed its petition for an appeal, which has been allowed by the court, and the said appellant desiring that a record in said cause be transmitted to the Supreme Court of the United States, you are hereby requested to prepare and certify a transcript of the record in said cause, to be filed in the Supreme Court of the United States, and to incorporate into said transcript the following portions of the record:

(1) The verified bill in equity.

(2) The temporary restraining order issued February 14, 1928.

(3) The bond required by said temporary restraining order and given by plaintiff.

(4) The order of February 20, 1928, continuing temporary restraining order in force until hearing and determination of application for interlocutory injunction.

[fol. 75] (5) Amendment to bill in equity filed March 29, 1928, and order of court permitting the filing of such amendment.

(6) Further amendment to bill in equity filed March 29, 1928, and the order of court permitting the filing of such amendment.

(7) Plaintiff's application for interlocutory injunction.

(8) All motions in writing filed in said cause by either party.

(9) The order of the court taking said application for interlocutory injunction under advisement after hearing and arguments.

(10) The opinion of the court filed on or about April 12, 1929.

(11) The addendum to said opinion filed on or about April 13, 1929.

(12) The order of April 13, 1929 substituting Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, as successor in office to Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, and substituting Stratton Shartel, Attorney General of the State of Missouri, as successor in office to North Todd Gentry, Attorney General of the State of Missouri.

(13) The order of April 13, 1929 ruling upon and denying plaintiff's application for interlocutory injunction.

(14) Petition for appeal.

[fols. 76 & 77] (15) Assignment of errors.

(16) Order allowing appeal, fixing amount of appeal bond and approving same.

(17) Appeal bond.

(18) Citation together with acceptance of service thereon by appellees.

(19) Statement of the evidence approved by the court and filed in said cause.

(20) All other orders appearing upon the record and not incorporated under the foregoing requisitions.

(21) This præcipe.

(22) The præcipe, if any, filed by appellees.

Robert J. Folonie, William F. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

April 29, 1929.

Service of a copy of this præcipe acknowledged this date. Floyd E. Jacobs, John T. Barker, Solicitors for Appellees.

[fol. 78] In United States District Court

Before Honorable Kimbrough Stone, Circuit Judge; Honorable Albert L. Reeves, District Judge; Honorable Franklin Kennamer, District Judge

Statement of Evidence—Filed May 10, 1929

This matter coming on to be heard upon the application of the plaintiff for an interlocutory injunction, on the 20th day of April, A. D. 1928, there appeared for the plaintiff Messrs. Robert J. Folonie, William S. Hogsett, John S. Leahy and Ashley Cockrill, Solicitors for Plaintiff, and for the defendants Messrs. North Todd Gentry, John T. Barker and Floyd E. Jacobs, Solicitors for Defendants, thereupon evidence was produced as follows:

"Mr. Hogsett: In addition to the verified bills we desire to file affidavits in support of the bill."

Thereupon there was offered by the plaintiff and received in evidence the affidavit of Charles R. Street as Plaintiff's Exhibit 1, which, with formal parts thereof omitted, is in words and figures, as follows:

[fol. 79] Plaintiff's Exhibit 1

"Affidavit

State of Illinois,
County of Cook, ss:

Charles R. Street, being duly sworn, upon his oath says: I am Vice-President of the Great American Insurance Company and Vice-President of American Alliance Insurance Company, both of which are fire insurance companies doing a general business of insurance against fire, windstorm and all lines generally conducted by companies of that kind. I have held executive offices with fire insurance companies for many years and have been engaged in such business for about forty years past. I am familiar with

the practice of insurance companies during that period, not only the companies with which I have been associated, but also the general practice of companies engaged in the business of fire insurance.

As far back my personal experience goes (and for many years before that, according to my general knowledge of the business), fire insurance companies doing business in the United States have universally made their calculations for their own purposes and information, and in stating the results of their operations in the various states, as respects profit or loss derived on their business of underwriting or insurance during any specified period, upon the basis of earned premiums as income and incurred losses and incurred expenses as outgo. (The term "insurance" and the term "underwriting" are exact equivalents and are so understood in the business, and the operation of the business of insurance as conducted in Missouri and elsewhere is styled "underwriting.")

[fol. 80] During all my experience of more than forty years the ascertainment of a balance, as between written premiums (sometimes called "premiums received") and paid losses and expenses has been styled "trade balance", and such calculation is never used for the purpose of ascertaining profit or loss for a given period of time. It is generally recognized by those engaged in the business of fire insurance, that such trade balance when ascertained does not disclose a profit or loss and is inaccurately and misleadingly used if the balance so remaining is called or treated as a profit or loss.

The terms herein employed are properly defined as the same are used and employed by all persons engaged in or connected with such business, as follows:

"Written premiums" during a period of time are the premiums stipulated in all the policies issued during such period, no matter how far into the future such policies extend.

"Earned premiums" as respects the policies of a given company for a specified period of time, is that part of the premiums of all policies in force during any part of such period as pays for insurance during such period. The premium on a policy partly within and partly without of the period under calculation is prorated, and a pro rata of

the premium is taken into account, in the proportion that such part of the policy term within the period bears to the whole term of the policy.

"Unearned premium" is that part of the premiums stipulated in policies in force during the term under calculation which pays for indemnity after the term under [fol. 81] calculation, namely, which pays for insurance for the future.

"Incurred losses" respecting a period of time are those losses from perils insured against which happen, and liability for which becomes fixed, during that period of time upon risks insured against.

"Incurred expenses" are expenses for which liability becomes fixed during the period under calculation.

"Paid losses" are the losses which are paid during a given period, although they may not arise upon policies in force during the period under calculation, and although liability may have previously become fixed, and not taking into account any losses for which liability is fixed if they happen to be unpaid.

"Paid expenses" are those expenses which are paid during the period in question, although the liability for them may have become fixed during a precedent period; not taking into account expenses for which liability exists but which have not in fact been paid.

In my judgment (and it is the judgment universally held by those engaged in the business of fire insurance and who have studied the subject) the experience of a fire insurance company to ascertain its profit or loss for a period of time cannot be soundly computed by adoption of any basis except that of earned premiums as income, and incurred losses and expenses as outgo. The reasons supporting such judgment are as follows:

(a) Such is the uniform custom of companies and company accountants for their own purposes of profit and loss calculations, and is universally recognized and employed as the sound method of calculation by companies in their [fol. 82] own affairs.

(b) Such basis is adopted in the Annual Statement blanks prescribed by the Insurance Departments of every state in the United States, which (at page 10 of Missouri

Annual Statement blanks) require the companies to set forth their insurance or underwriting experience for an elapsed year upon the basis of earned premiums, incurred losses and incurred expenses. This is the only profit and loss calculation prescribed in such report, showing the profit or loss of each company in its nationwide business for the elapsed year.

(c) The basis of earned premiums, incurred losses and expenses is prescribed by the Congress of the United States as the method to be used in ascertaining and reporting the profits of insurance companies upon which they shall pay income taxes; and the definition of the Act of Congress is in accord with the practice of the companies and the standard prescribed in the Annual Statement blanks prepared by the Insurance Department of Missouri and other states.

(d) The statutes of many states, including Missouri, expressly prohibit an insurance company from paying dividends out of the unearned portion of its premiums. The company is permitted to declare and pay dividends only out of surplus profits. Surplus profits are arrived at by offsetting the company's liabilities against its assets; and among the liabilities so offset are included its unearned [fol. 83] premiums. It is, in my judgment, inherently illogical to say that unearned premiums are profits, or shall be treated as accrued income, when by statute the company is forbidden to distribute such unearned premiums among its stockholders. It is a contradiction in terms to denominate as a profit that which cannot be distributed as a profit.

(e) After two years of consideration of this subject by experts representing the fire insurance companies on the one hand through a committee and the insurance commissioners of the various states of the United States through a committee representing the public, the insurance Commissioners Convention (which is a voluntary association to which the insurance commissioners of every state in the Union, including Missouri belong) adopted the basis of earned premiums and incurred losses and expenses as the proper and uniform method to be used in calculating profit or loss. The report of the Committee of the National Con-

vention of Insurance Commissioners was approved and adopted by the Convention on December 7, 1921. Among other things that report states:

'Underwriting profit (or loss) is arrived at by deducting from earned premiums all incurred loss and incurred expenses.'

'No part of the so-called banking profit (or loss) should be considered in arriving at the underwriting profit (or loss).'

In such report, it was further found that:

'A reasonable underwriting profit is 5% plus 3% for conflagrations.'

The foregoing conclusions were adopted by the Conven- [fol. 84] tion accompanied by the statement that it was 'highly important that this body clearly express its convictions as to what constitutes a reasonable underwriting profit and a proper and uniform method of arriving at the same.'

(f) If the matter were one of first impression as to what is a sound method of ascertaining profit or loss, the earned and incurred method would, in my judgment, necessarily be adopted, because it is a sound method of accountancy. It is not in principle any different from principles of accountancy applied in other lines of business. If money be paid in advance for service or goods or indemnity, and a part of that which is to be delivered has in fact been delivered at a specified date, and a portion is to be delivered in the future, sound accountancy and common honesty requires that the money so paid in advance be not all treated as income when a liability for performance remains for the future. The amount or value of the future liability remaining must be set up for the unperformed or undelivered portion of the contract, otherwise the statement made is a false one. These principles specially apply to a policy of insurance, because, in every policy issued by fire insurance companies throughout the United States, there is uniformly a provision that the policy may be cancelled at any time, either by the insurance company or the person insured, and it is palpably illogical to treat as profit or accrued [fol. 85] income that part of the premium which has not been earned, and which may never become earned, but which the

company may be compelled to return to the policy holder on cancellation.

A sound method of apportioning that part of the premium applicable to a past period and assigning another part to a future period, where performance is to be made through a given period of time, is to take that portion of time which has elapsed and ascertain its proportion to the whole period of time stipulated in the insurance contract. That proportion of the stipulated premium represents the amount earned at a specified time. The proportion which is prepaid or advanced, paying for future service or indemnity, is the unearned portion. The proportion as between earned and unearned premium is prorated properly and soundly according to the proportion of the policy term within and without the test period under calculation.

In no other way can the experience of any given period of time, such as a five year period, be segregated. If the profit or loss of a company for a given year or a given number of years is to be ascertained, no other method will disclose or even fairly indicate the profit or loss for the period.

(g) There is an element of marked error in resorting to the "received and paid" method, namely, by taking into account written premiums (sometimes loosely styled premiums received) as income and paid losses and expenses as outgo. The fire insurance companies doing business in [fol. 86] Missouri universally write a considerable volume of policies for three and five years, as well as for one year. This is common practice throughout the United States. If all the written premiums be taken into account for a one year period ending December 31, 1927, then on all three year policies written in 1927 there would still be indemnity to be furnished during the years 1928, 1929 and 1930.

For five year policies it would extend into 1931 and 1932. In taking the experience for one year, taking into account premiums written only during that year, there would be taken into account as income, premiums paying for insurance extending over five years of time against which would be set up losses and expenses paid during 1927.

(h) The only way of setting up operating income for a period of say, five years, against outgo of the same five years, is to set up the losses and expenses which happened on the policies in force, and for which liability became fixed,

during those five years, and to take into account only the earned premiums, that is, the premiums which pay for insurance during that period. Under the earned method of calculation, policies written during a prior period than that under calculation, are taken into account insofar as they extend into the period under calculation.

It is my opinion and it is the concensus of opinion among persons engaged in the business of fire insurance, who have given any consideration to the subject, that a reasonable standard of profit measurement is 10% upon the earned [fol. 87] premiums. This standard, which is generally accepted in the insurance field, has been limited by the Insurance Commissioners Convention to 8%, of which 5% is styled a profit and 3% an allowance for conflagration losses. Whichever method may be the more advisable, it is important to understand that such measure is in no way a guaranteed profit, nor necessarily any profit at all. Its employment merely means that applying such measure to the past experience there is no unreasonable profit to be anticipated in the future. The business of fire insurance is an extremely hazardous one and if, upon a given level of rates a serious loss occurs, there is no means of recouping such loss.

There is such sharp competition with mutual insurance companies, reciprocal insurance companies, Lloyds and other individual insurers and other stock companies writing similar lines of insurance, and such competition among stock fire insurance companies themselves, that no likelihood exists, in my judgment, for exorbitant charges, even if no regulation of any kind existed. The companies in general are doing business at a very narrow margin, so narrow that any unexpected and unusual loss in any state will operate to deprive the companies there of any profit over any period of time.

The State of Missouri has been a notoriously unprofitable state for fire insurance companies for more than fifteen years past, and the companies with which I am associated in an official capacity, have had an unprofitable experience in that state during such period of time.

It is true that a large number of the old and well established fire insurance companies have corporate earnings enabling them to pay reasonable dividends to their stock-

[fol. 88] holders, even though they may not make anything on their business of insurance in Missouri. It is to be borne in mind that such profit-making companies, almost without exception, are those companies which have been engaged in business for fifty or a hundred years and have accumulated very large reserves, which they have retained for investment instead of distributing the same to the stockholders, as they might have done, and do business in other states and countries where they make a profit. These profits may have been derived in some part from insurance, and in some part from compounding their capital and surplus, investing and re-investing the earnings upon it, so that in many cases the surplus has been developed into a figure in excess of the original contributions to stockholders. These earnings so derived from investments and insurance conducted elsewhere are distrinct from and not involved in the business of insurance in the State of Missouri, nor have they been, during any of the past ten or fifteen years and more, derived in any part from Missouri business, except in case of a few companies unusually fortunate or restricting their business to specified classes.

It is neither practical nor possible to make any profit calculation upon the basis of capital, as is done in case of railroads and public utility companies, because the business is fundamentally different in its nature. Any calculation of profit and a reasonable return must be upon the basis of a reasonable charge for the service and indemnity rendered, which, as I have already said, should be upon the basis of 10% upon earned premiums; and it may readily happen that when so calculated, by reason of the hazards of the business, no profit whatever will be derived from the business when and as conducted pursuant to such basis. [fol. 89] The reason that no profit in any amount necessarily results from application of such basis of calculation is because the risks assumed are in general one hundred times the premium, and in some cases, even more, so it can readily occur that losses may and often do happen that defeat all effort at prior calculation. No calculation upon the basis of capital used or useful in the business is possible, for many obvious reasons, among others:

Many companies are engaged in the business, which companies are foreign to the United States and organized under the laws of other countries. Such companies make a deposit

of $200,000 in the state of New York and receive remittances from their home office or send remittances to them as their business proceeds. American companies may have capital of from $200,000 to many millions of dollars. Some do business in only a few states, others in all states in the Union, and still others worldwide. Two companies, doing an equal volume of business in the state of Missouri, may in one case have a capital of $200,000 and in another case of $10,000,000. As neither company has its capital invested in the state, in the sense that utilities and railroads do, it is apparent that no theory of allocation of the capital is practical or possible. The observations herein made as to a proper basis of profit computation are probably not highly material upon the hearing now being had, because the companies here suing have made no profit at all or a purely nominal one which the rate orders would entirely destroy.

Stock fire insurance companies doing business in Missouri each and all have two distinct activities in which they are [fol. 90] engaged,—first, that of insurance or underwriting as operated in Missouri, and second, that of investment of their monies conducted at their home offices. The latter department of activity is sometimes referred to as their Banking or Investment Department. In the case of the larger stock fire insurance companies, these Departments are carried on with complete independence, having one or more executive officers in charge of investments with a separate staff of employes. The investment department is charged with rents, salaries of employes and executive salaries independent of the operation of the insurance department of the business. In the case of smaller companies, the activities are also carried on independently, except that the President of the company will in such cases usually buy and sell securities under direction of the Board of Directors, and the time spent by him on such features of the business is a comparatively inconsequential part of his time. The expense is kept strictly separate in case of such companies also. The directors who take the responsibility on such matters customarily serve without compensation or for a nominal compensation, and are men of business experience in different lines of industry, who lend their experience to the investment problems of the company.

Fire insurance companies are required by law and by the nature of the business to keep their capital out of the busi-

ness of insurance and keep it as a fund in the nature of a guarantee fund. The moment it is employed in the business of insurance the company is insolvent. The capital must be kept intact and not used for salaries, rents, loss payments, etc. If even a dollar of it is so used, the company is impaired and insolvent and prevented from doing business. In this respect fire insurance differs from most [fol. 91] lines of business. In some other kinds of business the capital is employed in the business and invested in tangible assets and not required by law to be kept out of the business. The free or distributable surplus of fire insurance companies, commonly called "surplus" is a sum in excess of capital and in excess of all liabilities, such as reserves for unearned premiums, loss payments, etc. This fund is also free from the burdens of the business and not mingled with the operations of the business of insurance. It may be borrowed to set up reserves or make up losses in the business, and when so used, it is taken out of and ceases to be free surplus.

It is therefore just to say that both capital and free surplus are entirely distinct from the operations of the business of insurance; and if the companies should cease doing business of insurance, they would have their entire capital and free surplus available to lend out at interest, without taking any of the hazards of the business of insurance. The relation of these funds to the business of insurance is, in substance, that of a guarantee fund, which guarantees that resources exist to which resort may be had if necessary, to meet unfortunate losses.

The investment of capital and surplus of all the plaintiff companies in the present suits (except as to one company, which is incorporated in Missouri,) in every case is done at the home offices of the companies in other states, and not in the state of Missouri.

For a great many years the fire insurance companies have paid to their St. Louis agents a scale of commissions approximately five per cent in excess of the scale in force in the remainder of the state. This custom of paying these so-called "excess commissions" to St. Louis agents has been the result of an insistance on the part of said agents [fol. 92] that they render greater service than agents elsewhere in the state and that their expense of operation is

greater in that city than the expense of agents in other smaller cities and towns of the state. The St. Louis agents have consistently demanded a higher scale of commission on account of this increased expense of operation, and on account of the increased service rendered by such agents to the companies. The practice of paying the excess commissions is not one that the companies voluntarily adopted, but one which was forced upon stock fire insurance companies by competition of other competing kinds of insurers and by competition with one another. While fire insurance companies in Missouri write insurance at the same rates, there is very keen competition between them in the obtaining of business and in securing desirable agency connections. The excess commissions have been actually incurred and paid by the companies, because in the judgment of their respective officers and agents the same were a necessary expense, and because of the long years during which said commissions have been paid, and in view of the competitive conditions above referred to it is impractical to destroy existing relations with agents by any company which desires to remain in business in Missouri.

(Signed) Charles R. Street.

(Jurat.)"

Thereupon there was offered by the plaintiff and received in evidence the affidavit of F. P. Hamilton as Plaintiff's Exhibit 2, which, with formal parts thereof omitted, is in words and figures, as follows:

[fol. 93] PLAINTIFF'S EXHIBIT 2

"Affidavit

STATE OF ILLINOIS,
County of Cook, ss:

F. P. Hamilton, being duly sworn, upon his oath says: I am Vice-President of the Queen Insurance Company, and have been engaged in the business of fire insurance as an employe and executive officer for over thirty years past. I have read the affidavit of Charles R. Street, to be presented upon motion for an interlocutory injunction; and state that what he says therein respecting the earned and

incurred basis of profit calculation and respecting commissions and the conduct of the business of insurance is true. The considerations by him stated have been true since I engaged in this business; and I can only add, for the information of the court, that by the statutes of Missouri, a reserve is required to be set up in the statements made by stock fire insurance companies to the State of Missouri on a pro rata basis for the unearned premium to be set up as a liability.

I am in accord with the principles of such statute and believe that it is a sound business practice, regardless of statute, to set up a pro rata proportion of premiums to cover liability for unexpired terms of policies; and that it is likewise sound to set up as outgo incurred losses and incurred expenses when calculating profit or loss and unsound to consider only paid losses and paid expenses for a given period, but which occurred during a former period and which have no relation to policies in force during the period under computation.

I am familiar with the agency expenses incurred and paid [fol. 94] to agents by companies doing business in the state of Missouri for many years past. The general rates of commission exacted by agents in the state of Missouri, outside of St. Louis, have for many years been 15%, 20% and 25%, depending upon the character of the business and differing as between companies within such limits, dependent upon the difficulties of the companies in securing proper agency connections through which to secure their business. These matters are matters of contract between the companies and agents. In general, the companies have been compelled to pay about 5% more in St. Louis for securing a like kind of business, than they have paid elsewhere in the state. This situation has arisen out of the claim of agents that they have higher expense for rent, clerk hire; that they employ services of engineers in inspecting risks, and have other expense, and more intricate and difficult risks requiring greater expenditure of time and money to ascertain their character, than do the agents elsewhere in the state. I have known in recent years of many efforts by various companies to reduce their commission arrangements with agents, but it has proven impractical to materially reduce commission rates below those which now exist. If any company should reduce its commission rates,

the agent representing it will either terminate his contract with that company or secure representation of other companies, or divert business to other companies represented in his agency, with the consequence that the company attempting to write at less than the commission rates paid by its competitors invariably loses its better business in such agencies where it undertakes to do so and has presented to it the poorest business, or none.

The agents maintain associations which support their efforts to keep commission rates unimpaired, and I am of [fol. 95] the opinion that considering the conditions existing in the business in respect to competition with other types of insurers, and competition existing between stock companies, one against the other, and having reasonable regard for the rights of the public, of the agents and the insurance companies, that while lower commission rates would be desirable from the standpoint of the companies, that considering the rights of others and considering the practical effects of competition, no marked change is at this time possible.

The normal expense of a well managed and established company doing business in the state varies in its relation to earned premiums, dependent on many factors. A company in the state for less than five years will almost necessarily have a larger expense ratio, although its absolute expense may not be much greater. This in no way indicates that the company is badly managed or that its expenses are abnormal, but such higher expense ratio arises out of the fact that until it has been established for five years or more, the accretions to its premiums derived from prior writings are necessarily small, comparatively, and its losses and expenses become liabilities practically contemporaneous with their occurrence. Owing to the fact that its distribution will not be as wide as that of an older and larger company, (the amount at risk being well over one hundred times the premium charge,) the happening of a comparatively few major losses may wipe out the entire premium earned during a given period, whereas similar losses in a company having a wider distribution would cause a smaller ratio of losses.

It is for these reasons that smaller companies of those newsly in the state will show greater unevenness in experi-

[fol. 96] ence than older companies, having a wider distribution of their business.

My attention has been called to the fact that the Superintendent of Missouri, in his rate order, took into account a sum as "interest on unearned premium." In my opinion, this is an unsound method of accountancy and "interest on unearned premium" should not be taken into account as income in setting up a profit and loss statement for rate-making purposes.

The basis of profit calculation adopted by the National Convention of Insurance Superintendents provides for a profit of 5% and an additional 3% for conflagration hazard. The standard by them adopted contemplates excluding anything but earned premiums as income. If any income of the company from invested assets were to be taken into account as a supposed underwriting income, then I would say the profit base ought to be changed and that least a 10% profit on earned premiums ought to be permitted. It is illogical, however, in my opinion, to take into account any sum as "interest on unearned premiums," and the reasons, which are generally recognized to be sound by those engaged in and acquainted with the business of insurance and so recognized by me, are as follows:

(a) Term policies (that is, policies for three and five-year periods) form a very substantial part of the business. Such policies are uniformly written by companies upon a basis of premium charge lower than upon annual policies and policies for a shorter period. By universal practice, three-year policies are written for two and one-half times an annual premium, and five-year policies are [fol. 97] written for four times an annual premium. An allowance is thus made to the policyholder for the prepayment which is fully compensatory for the use of the money. The allowance so made is a fair equivalent of interest upon the money prepaid and is allowed to the policyholder upon taking his policy. Policies for one year and less are treated as contemporaneous payments, and must practically be so considered because it is not practical, as a business matter, to make payments exactly contemporaneous with the rendition of service which is rendered day by day. The company uniformly extends credit to its agents, who remit their balances in the second month after policies are written and

sometimes not then. The companies are required to keep on hand a large amount of cash to meet loss and expense contingencies, which sums remain uninvested. In unprofitable states, like Missouri, where the income is insufficient to meet outgo, the companies are required to resort to their free surplus to pay losses and expenses, and the unearned premium reserve is made up, in considerable part, out of surplus and not out of premiums. Even in cases where business runs normally and profitably about 40% of unearned premiums are constantly furnished out of free surplus. This in time flows back and is in a state of daily flux. In a company actively engaged in underwriting, it has to lend to the reserve constantly to the extent of about 40% of the reserve.

(b) The policy contract between the insurance company and the policyholder provides for a prepayment of premium by the policyholder, with no provision for repayment [fol. 98] or allowance or return of anything to the policyholder, except in case of cancellation. Upon payment of the money by the policyholder, it becomes the money of the insurance company, subject to the furnishing of indemnity and contingency of cancellation.

(c) "Interest on unearned premium" is really a misnomer, and it is unsound, in my judgment, to give it consideration as income in a rate calculation. The unearned premium is not an amount existing as of a period of time but is a balance ascertainable as of a given date. Not only is it difficult, if not impossible, to compute, but the term itself is a misleading one. When the policyholder pays the agreed premium, he contracts to pay this sum and to receive an equivalent indemnity for it, thereby he is divested of the money entirely and it becomes completely the money of the insurance company, subject only to a condition subsequent, namely, cancellation.

Eliminating cancellation from present consideration as not bearing upon the immediate inquiry, the money is definitely transferred to the insurance company and the insured definitely gives it up, whereby it completely changes hands and is the money of the insurance company, in which the policyholder has no interest. What the policyholder is entitled to from that time forward is not money, but indemnity.

By the statutes of Missouri and other states, the insurance companies are required to set up a reserve in their accounts, to insure their ability to render the indemnity provided for. This is not required to be segregated from other [fol. 99] assets, but merely a method of bookkeeping adopted to disclose the amount of premium applicable to future liability. As the several policies progress to their maturity, there is either under a given policy no loss at all, in which event the money remains with the insurance company; or there is a cancellation, in which event the unearned or returned premium is paid to the policyholder; or there is a total loss, upon occurrence of which a sum, varying usually from one hundred to two hundred times the amount of the premium, is paid to the policyholder.

The division of premiums into earned and unearned premiums is necessary, for purposes of accountancy, to set up the portion of the premium applicable to an elapsed and unelapsed period. In other words, to segregate the premiums into parts, dependent upon the date to which any given calculation is to be made. This has not the slightest bearing, however, upon the title to the money, which is in the insurance company from the time the policy is written, subject only to a condition subsequent—cancellation. The unearned premiums is as much the money of the company as the earned premium. The unearned premium is set up in every statement as a liability, in the same way that capital is set up as a liability, and the remainder, after setting up capital and unearned premiums and like liabilities, represents surplus. The fact that it is so set up as a liability does not imply that it is a liability to policyholders, for it is set up in exactly the same way that capital and surplus are. The sum is so set up as a sound method of ac- [fol. 100] countancy, to value the service which has been contracted for and not yet rendered but which has been paid for, which must be set up as a liability item in any just account, to show the ultimate balance remaining as a distributable surplus.

(d) The unearned premiums are not segregated as a separate and distinct fund, although they may be stated at any given date and each cancellation of any policy and each happening of a total loss and the mere lapse of a day

of time will change the unearned premium figure from what it was immediately before. It is a constantly shifting amount, varying from day to day. The happening of a total loss on an insured property terminates all liability under the policy, and therefore terminates all unearned premium on that particular policy. Likewise, a cancellation and return of premium on a specified policy terminates the setting up of any unearned premium on it. The unearned premium so shifting from day to day is in fact set up out of general surplus. Every fire insurance company must keep some cash on hand for expenses for current losses and for contingencies. It additionally has uninvested assets in agency balances representing a large sum of money, so that constantly there is a very large sum of money showing as assets on the company's books which are entirely uninvested, and some of which are not in hand except theoretically. Of its invested assets a considerable part must be kept in securities of the highest grade of marketability, bearing small interest rates so as to be immediately avail-[fol. 101] able in case of contingency. The unearned premiums represent a most important part of the business, a constantly fluctuating liability, and for which the company must always be prepared to return to its policyholders. I think it is fair to state therefore that the average rate of income which the company's investments produce would be a rate much greater than any income justly attributable to unearned premium.

I am of opinion that a basis of 10% on earned premiums is a fair basis of underwriting profit and that if the basis of 8%, declared by the Insurance Commissioners Convention, were to be adopted and an item of interest on unearned premiums were to be additionally considered as if it were underwriting income, that it would reduce the basis to so low a figure that its adoption nationwide and its enforcement would drive great numbers of well managed companies out of business. I recognize the fact that there are quite a number of companies which have been in existence for 75 or 100 years which have accumulated large sums, which they have refrained from distributing to stockholders, who could do their underwriting business at a loss for a considerable period of years and still remain solvent. This is not true, however, of the majority of companies, who are compelled to look to their business of insurance as

a source of income, and, in my judgment, are entitled to do so if they are to remain in such business.

(Signed) F. P. Hamilton.

(Jurat.)"

[fol. 102] Thereupon there was offered by the plaintiff and received in evidence the affidavit of Paul W. Terry as Plaintiff's Exhibit 3, which, with formal parts thereof omitted, is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 3

"Affidavit

STATE OF MISSOURI,
County of Jackson, ss:

Paul W. Terry, of lawful age, being first duly sworn upon his oath says:

I am now, and for more than eight years last past have been, a member of the firm of Waterworth & Terry, who operate and are managers of the Missouri Inspection Bureau. The managers operating the Missouri Inspection Bureau, as agents for the stock fire insurance companies doing business in Missouri, for thirteen years last past have maintained, and do now maintain, in the State of Missouri the public rating record required by Section 8270 R. S. Mo. 1919. As manager of the Missouri Inspection Bureau I have knowledge of the several rate reduction orders made by Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, on January 5, 1922, October 9, 1922 and November 9, 1923.

The first of these rate reduction orders was made on January 5, 1922, and was in words and figures as follows to wit:

'Insurance Department, State of Missouri, City of Jefferson

Ben C. Hyde, Superintendent; Joshua Barbee, Deputy; R. E. Daly, Actuary; Wilbur F. Marine, Jr., Chief Clerk

Missouri Inspection Bureau, Waterworth & Terry, Managers, Pierce Bldg., St. Louis, Missouri:

[fol. 103] Section 6283, Revised Statutes of Missouri 1919, provides that the Superintendent of Insurance, upon his

own motion, is empowered to investigate the necessity for a reduction in rates charged by the stock companies doing a fire, lightning, hail and windstorm insurance business in the State of Missouri. I have made such investigation and from such investigation and the underwriting experience reports of the companies filed with the Insurance Department of Missouri, it appears to me that the earnings in the State of Missouri of the stock fire insurance companies for the five years next preceding such investigation show that there has been an aggregate profit in excess of what is reasonable.

The Missouri Inspection Bureau is the rating and actuarial bureau through which the said stock companies maintain their public rating record as required by the laws of the State of Missouri. Therefore, you are notified as the representative of the stock fire, lightning, hail and windstorm insurance companies listed with or subscribers at the Missouri Inspection Bureau, a list of which is hereto attached, and through the Missouri Inspection Bureau I desire to notify said companies, that I have this day ordered a reduction of fifteen per cent in the rates now authorized by the Missouri Inspection Bureau and charged by the aforesaid companies on the fire, lightning, hail and windstorm insurance business written in the State of Missouri, which reduction, in my judgment, will leave said companies a reasonable profit after giving proper reasonable consideration to the conflagration liability within and without the state.

The aforesaid reduction ordered shall take effect and be in operation on and after the 15th day of February, 1922, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not within thirty days from this order of reduction submit a class or classes which meet the approval of the Superintendent of Insurance, the Superintendent will designate the class or classes to which the reduction shall apply.

Ben C. Hyde, Superintendent of Insurance.

Dated at Jefferson City, Missouri, this 5th day of January, 1922.'

This rate reduction order was made by the Superintendent without any notice whatever to any of the stock

fire insurance companies doing business in Missouri and without any notice to the Missouri Inspection Bureau, and without any hearing, or opportunity to be heard, accorded to any of said companies or said Bureau. The first notice of said order received by any of said companies or by said Bureau was after the order was made and promulgated by the Superintendent. There was no opportunity to any of [fol. 104] said companies or to said Bureau to offer evidence or make any showing before the Superintendent as to the result of the business in Missouri of said companies, or any of them, preceding the making of said order.

Thereafter on February 4, 1922 one hundred forty stock fire insurance companies filed a suit to enjoin said rate reduction order, and a temporary restraining order was issued by the Cole County Circuit Court accordingly.

Thereafter on February 14, 1922 the plaintiffs in that suit entered into a stipulation with the Superintendent, as follows:

'In the Circuit Court of Cole County, Missouri, November Term, 1921

ÆTNA INSURANCE COMPANY et al., Plaintiffs,

vs.

BEN C. HYDE, Superintendent of the Insurance Department of the State of Missouri, Defendant

Stipulation

Whereas, Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, has this day withdrawn and revoked the order published and declared by him on the 5th day of January, 1922, effective February 15, 1922, reducing the rates of insurance charged by all stock fire insurance companies doing business in the State of Missouri on all fire, lightning, hail and windstorm business written by them in this State; now, therefore, it is hereby stipulated by and between the parties hereto that the following order may be entered of record in this cause:

1. The above entitled cause is hereby dismissed, and the restraining order heretofore entered therein is hereby dis-

the conditions of said restraining order is hereby satisfied and discharged, and the surety on said bond is hereby released.

[fol. 105] 2. It is further stipulated and agreed that the said Superintendent of the Insurance Department, defendant herein, may, not earlier than March 15, 1922, call a hearing to investigate the necessity for a reduction in rates charged by the stock fire insurance companies doing a fire, lightning, hail and windstorm insurance business in this State; that at such hearing, if and when called, the stock fire insurance companies will appear by counsel and will produce such evidence as may be required by the Insurance Department, or they may see fit to present, bearing upon such question; that at such hearing the experience of said companies in the State of Missouri for the year 1921 shall be offered in evidence and considered by the Superintendent of the Insurance Department, together with such other evidence as may be offered in reaching his determination; that at the conclusion of such hearing the Superintendent of the Insurance Department will make findings of fact and announce his determination thereon, and that he shall, in writing, find all essential, material and competent matters of fact disclosed by the evidence; that he shall make the following findings:

(a) What was the profit of said stock fire insurance companies during the five years preceding said investigation, including the year 1921;

(b) What is a reasonable profit on the business written in this State;

(c) What per cent of premiums received is allowed for the conflagration hazard;

(d) What is the basis upon which earnings in Missouri should be determined and ascertained;

(e) What is the ratio of expenses incurred to premiums earned in this State during said period;

(f) What is the ratio of losses incurred to premiums earned in this State during said period;

(g) What is the total amount of earned premiums during said period.

3. That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

4. That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force [fol. 106] prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

5. That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney-General, Merrill E. Otis, Assistant Attorney-General, Attorneys for the Defendant.'

In accordance with the stipulation the 15 per cent order of January 5, 1922, was revoked by the Superintendent and the injunction suit was dismissed. Thereafter a hearing was had, and on October 9, 1922, the Superintendent made the 10 per cent reduction order, which is one of the two orders involved in the present suits.

Of the plaintiffs in the present suits now pending in the United States District Court for the Central Division of the Western District of Missouri, the following were not parties to the aforesaid injunction suit or to the stipulation filed therein:

London & Provincial Marine & General Insurance Co., Ltd.
Chicago Fire & Marine Insurance Co.
National Security Fire Insurance Co.
Superior Fire Insurance Co.
Potomac Insurance Company of the District of Columbia.
East & West Insurance Co.
The Eagle Fire Company of New York.
Northwestern Fire & Marine Insurance Co.
Philadelphia Fire & Marine Insurance Co.
The Carolina Insurance Co.
Columbia Fire Insurance Co.
Merchants Insurance Co.
The Travelers Fire Insurance Co.
Twin City Fire Insurance Co.
Delaware Insurance Co.
[fol. 107] Eureka-Security Fire & Marine Insurance Co.
Federal Union Insurance Co.
Lumbermen's Insurance Co.
Merchants' Fire Insurance Co.
National Reserve Insurance Co.
Presidential Fire & Marine Insurance Co.
Sentinel Fire Insurance Co.
The World Fire & Marine Insurance Co.
First American Fire Insurance Co.
General Insurance Company of America.
Harmonia Fire Insurance Co.
Mercury Insurance Co.
New York Underwriters Insurance Co.
Guaranty Fire Insurance Co. of Providence.
New York Fire Insurance Co.
American Equitable Assurance Co.
Western Fire Insurance Co.
The Preferred Risk Fire Insurance Co.

The Superintendent did not, either in his rate reduction order of October 9, 1922 or otherwise, make the findings specified in subdivisions (a) to (g) of paragraph 2 of said stipulation above quoted.

In the Superintendent's 10 per cent rate reduction order, of October 9, 1922, the Superintendent stated:

'You and each of you are hereby notified that I have this day ordered a reduction of ten per cent in the rates now

charged by the aforesaid companies on fire, lightning, hail and windstorm insurance business written in the State of Missouri, which reduction, in my judgment, will still leave said companies a reasonable profit after giving proper and reasonable consideration to the conflagration liability both within and without the state.

The aforesaid reduction order shall take effect and be in operation on and after the 15th day of November, 1922, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not within thirty days from this order of reduction submit a class or classes which meets the approval of the Superintendent of Insurance, the superintendent will designate the class or classes to which the reduction shall apply.'

The companies did not, within thirty days from the order of October 9, 1922, or at any other time, submit any class or classes for the approval of the Superintendent of Insurance; and the Superintendent delayed from October 9, 1922 until February 1, 1928 before he attempted to desig- [fol. 108] nate the classes to which said 10 per cent reduction in rates should apply. On February 1, 1928 the Superintendent for the first time undertook to designate the classes to which said reduction should apply, such designation being as follows:

February 1, 1928.

Missouri Inspection Bureau, Waterworth & Terry, Managers, Pierce Building, St. Louis, Missouri.

GENTLEMEN: Whereas, on October 9th, 1922, I, Ben C. Hyde, under the authority granted me as Superintendent of Insurance by Section 6283, Revised Statutes of Missouri for 1919, did order a reduction of ten per cent on all fire, lightning, hail or windstorm insurance rates effective in the State of Missouri on and after November 15th, 1922, and whereas the Supreme Court of Missouri on May 21st, 1925, upheld this action, I hereby require that on February 1st, 1928, this reduction be applied to the existing fire, lightning, hail or windstorm rates for all classifications of such risks in this state.

Yours very truly, Ben C. Hyde, Superintendent of Insurance, by J. A. Rathbun, Deputy Superintendent.

At no time prior to February 1, 1928 did the Missouri Inspection Bureau or any of the stock fire insurance companies doing business in Missouri have any notice whatever as to the class or classes to which the Superintendent's 10 per cent reduction in rates should apply.

Risks which are insured against loss by fire, lightning, hail and windstorm in Missouri are, for the purpose of rate making, divided into so-called "classes." The word 'classes', as here used, and as universally used and understood in the business of making insurance rates, does not have reference to the description of hazards insured against, such as fire, lightning, hail and windstorm, but [fol. 109] means the classifications of property for the application of rates thereto, as the same are classified by those engaged in the business of insurance. The Superintendent has since 1915 required stock fire insurance companies to report to him annually their experience in Missouri, and has required the companies in making such report to use a blank denominated 'report of underwriting experience by classes.' This blank requires a report by the companies of their experience, separately stated, on various classes of property, including dwellings and their outbuildings, fraternity and sorority houses, flats, tenements and apartments, mercantile buildings, mercantile contents, churches and chapels, other public buildings and contents cereal, grist, feed, rice and flour mills, cotton compresses and warehouses, cotton gins, farm risks, grain elevators and warehouses, lumber yards, metal workers, mining property, oil risks, railway risks, tobacco warehouses, wharf risks, wood workers, miscellaneous manufacturing risks, etc. Many of these classes are subdivided into fireproof, brick and frame classifications. The classes so set out in the 'report of underwriting experience by classes' indicate the nature of 'classes' as that word is used in the business of insurance rate making.

At no time prior to February 1, 1928 could any insurance company or insured have known what the rate of premium would be upon any given peice of insurable property, under the Superintendent's reduction order of October 9, 1922.

The Superintendent might conceivably have applied the entire rate reduction upon tornado rates in such an amount as would accomplish a reduction of 10 per cent upon fire,

lightning, hail and windstorm; or he might have applied it all on fireproof risks, or on coal mines, or on any other class which it pleased him to select. It was impossible, in [fol. 110] advance of the Superintendent's designation of classes on February 1, 1928, to know what the actual reduced rate (under the reduction order of October 9, 1922) would be on any particular risk. It turned out finally on February 1, 1928, that the Superintendent directed that the reduction be applied equally upon all classifications of fire, lightning, hail and windstorm risks. But until the designation was actually made, neither the companies nor the insured property owners knew or could know how he would apply it.

(Signed) Paul W. Terry.

(Jurat.)"

Thereupon there was offered by the plaintiff and received in evidence the affidavit of Paul W. Terry as Plaintiff's Exhibit 4, which, with formal parts thereof omitted, is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 4

"Affidavit of Paul W. Terry

STATE OF MISSOURI,
County of Jackson, ss:

Paul W. Terry, of lawful age, being first duly sworn, upon his oath says:

I am now, and for more than eight years last past have been, a member of the firm of Waterworth & Terry, who operate and are managers of the Missouri Inspection Bureau. The managers operating the Missouri Inspection Bureau, as agents for the stock fire insurance companies doing business in Missouri, for thirteen years last past have maintained, and do now maintain, in the State of Missouri, the public rating record required by Section 6270, [fol. 111] R. S. Mo. 1919. As manager of the Missouri Inspection Bureau I have knowledge of the income and outgo of stock fire insurance companies for various years including the years hereinafter mentioned.

The aggregate experience in Missouri of all of the one hundred fifty-five stock fire insurance companies, plaintiffs in the above suits, for the years 1922 to 1927 inclusive was as follows:

Income (Earned Premiums)	$139,972,636
Outgo (Incurred Losses and Expenses)	151,205,738
Loss	11,233,102

That said one hundred fifty-five companies include all of the stock fire insurance companies which were engaged in business in Missouri during said period, with the exception of four or five small companies, whose exact figures are not available. That the experience of said four or five companies, not included in the above tabulation, was a negligible percentage of the aggregate business of all the companies doing business in the state during said period and was insufficient in amount to materially effect the result of said tabulation.

(Signed) Paul W. Terry.

(Jurat)."

OFFER IN EVIDENCE

Thereupon the plaintiff offered in evidence and there was received in evidence Notice with Proof of Service, served five days before the hearing of application for injunction with proof of service upon the Governor of the State of Missouri and the Attorney General of the State of Missouri.

Thereupon the defendants offered in evidence an order of the Supreme Court of Missouri, of date April 9, 1928, as Defendants' Exhibit A, which, with formal parts omitted, is as follows:

[fol. 112] DEFENDANT'S EXHIBIT "A"

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1927

No. 26187

ÆTNA INSURANCE COMPANY et al., Respondents,

vs.

BEN C. HYDE, Superintendent of the Insurance Department of the State of Missouri, Appellant

Order

It is ordered that this court retain jurisdiction in this cause for the purpose of making any other orders or judgments in the future which to the court shall seem just and proper.

I, J. D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true and correct copy of the order in the case of Ætna Insurance Company, et al., vs. Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, as made by this court, April 9, 1928.

In Testimony Whereof I hereunto set my hand and affix the seal of the Supreme Court of Missouri at my office in the City of Jefferson, state aforesaid, this 19th day of April, 1928.

(Signed) J. D. Allen, Clerk of the Supreme Court of Missouri. (Seal.)"

OFFER IN EVIDENCE

Thereupon the defendants offered in evidence certain pages from Bill of Exceptions in review proceeding in the Supreme Court of Missouri, showing names of the parties to such proceeding, wherein appeared the name of National Fire Insurance Company of Hartford as one of the plaintiffs in said cause.

Thereupon WILLIAM S. HOGSETT, being duly sworn, testified orally, as follows:

Direct examination by Mr. Folonie:

"My name is William S. Hogsett. I am one of the counsel for plaintiff. I have examined the records of the Circuit Court of Cole County as respects the existence there of a mandate of the Supreme Court of Missouri in the case of Ætna Insurance Company, et al., vs. Hyde. I present certified copy of the mandate of the Supreme Court of the [fol. 113] United States in that case filed in the Missouri Supreme Court on February 3, 1928."

Said instrument was offered in evidence as Plaintiff's Exhibit 5, and omitting formal parts thereof is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 5

"UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Whereas lately, in the Supreme Court of the State of Missouri, before you, or some of you, in a cause between Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, Appellant, and Ætna Insurance Company, Agricultural Insurance Company, Alliance Insurance Company of Philadelphia, et al., respondents, No. 26187, wherein the judgment of the said Supreme Court, entered in said cause on the 21st day of May, A. D. 1926, was in favor of the said appellant, Ben C. Hyde, Superintendent of the Insurance Department, etc., and against the said respondents; as by the inspection of the transcript of the record of the said Supreme Court which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty seven,

the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the writ of certiorari in this cause be, and the same is hereby, dismissed with costs; and that the said appellant, Ben C. Hyde, Superintendent of the [fol. 114] Insurance Department, etc., recover against the said respondents for his costs herein expended and have execution therefor.

January 3, 1928.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of Missouri, in order that such execution and proceedings may be had in said cause, in conformity with the judgment and decree of this above stated, as according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the tenth day of February, in the year of our Lord one thousand nine hundred and twenty eight.

(Signed) Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by P. R. Stansbury, Deputy.

File No. 32168. Supreme Court of the United States, October Term, 1927. No. 112. Ætna Insurance Company, Agricultural Insurance Company, Alliance Insurance Company of Philadelphia, et al., vs. Ben C. Hyde, Superintendent of the Insurance Department of the State of Mis- [fol. 115] souri. Mandate. Filed February 13, 1928. J. D. Allen, Clerk Supreme Court."

Thereupon, on April 21, 1928, Guy M. Sone, produced as a witness for plaintiffs and being first duly sworn, testified:

Direct examination by Mr. Hogsett:

"My name is Guy Sone. I am Deputy Circuit Clerk of Cole County, Missouri. I here produce the mandate of the Supreme Court of Missouri filed in the Circuit Court

of Cole County in the case of Ætna Insurance Company, et al., versus Ben C. Hyde, Superintendent, et al., cause Number 4566. The instrument now produced is the original mandate from the Supreme Court of Missouri taken from the files of my office."

Thereupon said mandate was read in evidence and omitting formal parts thereof is as follows:

EXHIBIT IN EVIDENCE

"Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cole County, rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be, and the same is hereby dismissed and that said appellant recover against the said respondents his costs and charges herein expended and have execution therefor. (Opinion Filed.)

STATE OF MISSOURI, set:

I, J. D. Allen, Clerk of the Supreme Court of the state of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, [fol. 116] entered of record at the April Term thereof, 1926, and on the 21st day of May, 1926, in the above entitled cause.

Given under by hand and seal of said court at the City of Jefferson this 7th day of March, 1928.

(Signed) J. D. Allen, Clerk. (Seal.)"

Endorsed with the following file mark: "Filed Mar. 9, 1928. Richard R. Nacy, Circuit Clerk."

Cross-examination by Mr. Barker:

"The date of filing the mandate was March 9, 1928. On receiving the mandate it was marked "Filed" and recorded in the records of the court."

Which was all the evidence produced on the afore and foregoing hearing.

Thereupon the cause was duly taken under consideration, oral arguments then and there made and time given the parties for submission of briefs.

The above and foregoing Statement of the Evidence is presented by the plaintiff and the same lodged in the clerk's office for examination of the defendants and approval of the court of said statements requested by the plaintiff and upon being approved by the court that the same may be filed in the clerk's office and become a part of the record for the purposes of the appeal.

Robert J. Folonie, William J. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

April 29, 1929.

Service of a copy of above Statement of evidence acknowledged this date.

Floyd E. Jacobs, John T. Barker, Solicitors for Appellees.

May 6, 1929.

This Statement is hereby approved.

John T. Barker, Floyd E. Jacobs, Solicitors for Appellees.

[fol. 117] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

The above Statement of Evidence having been lodged in the office of the clerk before the time of filing of præcipe by the plaintiff and due notice of the lodgment thereof together with nomination of time and place of presentation of same for approval having been given more than ten days before this date and all objections and proposed amendments thereto having been considered, said statement as above set forth is hereby certified to be a true, complete and properly prepared Statement of the Evidence and is approved by the court, and the clerk directed to file the same

and to make the same a part of the record for the purposes of appeal.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

Dated May 10, 1929.

[fol. 118] IN UNITED STATES DISTRICT COURT

Before Stone, Circuit Judge, and Reeves and Kennamer, District Judges

MEMORANDUM OPINION—Filed April 13, 1929

STONE, Circuit Judge, delivered the opinion of the court:

Section 6283, R. S. Mo. 1919, authorizes the Superintendent of Insurance of that State to reduce the rates of stock fire insurance companies, whenever the earnings of such companies, for five years, show "an aggregate profit therein in excess of what is reasonable," so as to limit the "aggregate collections by insurance companies in this state to not more than a reasonable profit." Section 6284 provides a review of such orders "by a proper action in the courts" wherein the "entire matter shall be treated and determined de novo" and pending which the rates fixed in such orders shall be in force.

Acting under Section 6283, the Superintendent made three orders reducing rates. The first was a reduction of 15% and was made January 5, 1922. Shortly thereafter, the companies filed a joint equitable action in the State court against the Superintendent and a temporary restraining order was entered preventing enforcement of the order. A few days later, a stipulation was entered into between the parties to that suit, one result of which was rescission of the order by the Superintendent. Although the above order is not involved in the present actions, the above stipulation and matters thereafter arising therefrom present one of the issues in these actions and will be discussed hereinafter.

The second order, made October 9, 1922, required a reduction of 10% in rates. A month later, all of the com-

panies affected thereby joined in a review proceeding under Section 6284 in the proper State trial court. That court set aside the order as unreasonable and confiscatory. On appeal to the State Supreme Court, the decree of the trial court was reversed (315 Mo. 113). The Supreme Court of the United States granted a writ of certiorari (273 U. S. 681).

[fol. 119] After hearing, the Supreme Court dismissed the writ on the sole ground that no federal question was presented (275 U. S. 440).

While the above action for review was in course, the Superintendent, on November 9, 1923, made a third order which required a reduction of 15% in rates.

Shortly after the above decision by the Supreme Court of the United States, 155 companies filed separate actions in this court against the Superintendent and the Attorney General of the State for the purpose of enjoining the enforcement of the two orders made on October 9, 1922, and on November 9, 1923, respectively. Shortly thereafter, and before hearing in this court, the Superintendent rescinded the order of November 9, 1923. The bills attack, in a similar manner, the order of November 9, 1923, and Section 6283 as then amended (Mo. Laws 1923, p. 234) but the fact that this order was rescinded before hearing and the fact that the 10% order was made before amendment of Section 6283 eliminate the 1923 order and the section as amended from our consideration. Taking the situation at the time of the hearing, our concern is with the validity of section 6283, unamended, and with the validity and the force of the order of October 9, 1922. As each of these cases involves the same issues, they were heard at one time, upon the applications for a temporary injunction, by a statutory court of three judges.

This hearing was upon the verified bills, motions to dismiss the bills, motions to dismiss the bills or to stay proceedings until complete restitution has been made to every policyholder in Missouri of any amount collected "in excess of such ten per cent reduction," affidavits and other testimony at the hearing.

Generally stated, the position of each complainant is that Section 6283, as construed (315 Mo. 113) and as applied to it, in the light of its separate experience, is unreason-

able and confiscatory and, therefore, the order reducing rates by 10% is void as to it. The attack of complainants may be placed under three general headings: first, the State has no power to regulate insurance rates; second, the regulation prescribed in Section 6283 is violative of Constitutional rights and, therefore, that section is void; third, the method pursued by the Superintendent in determining the basic facts for his action is unconstitutional and, therefore, the order based thereon is void.

In their motions to dismiss and motions to dismiss or to compel restitution, defendants urge three matters as a bar to our consideration of the above contentions of complainants. These are as follows: first, that complainants are estopped to file or prosecute these bills by the terms of the above stipulation; second, that the matters presented in these bills are all foreclosed by the decision in the review proceedings under Section 6283—such decision being res adjudicata thereof; third, that without the restitution to policyholders demanded in the motions filed herein, the complainants come into equity with unclean hands and should be denied all relief or, at least, denied relief until such restitution be made.

The Stipulation

Shortly after the reduction order of January 5, 1922, had been made, the companies affected thereby joined in an action in the State Circuit (trial) court in Cole County, Missouri. This action was an ordinary injunction proceeding to prevent enforcement of that order. A restraining order was issued therein. At that stage of the controversy, the parties agreed upon a course of action which was embodied in a written stipulation. This is the stipulation urged by the present defendants as a bar to each and all [fol. 120] of the present complainants. Of the present complainants, thirty-three were not parties to the stipulation (complainants' Exhibit 3, printed copy p. 7) and, therefore are not bound thereby. Our further discussion of the effect of the stipulation is applicable to, and only to, the complainants which were parties thereto. The stipulation is as follows:

"In the Circuit Court of Cole County, Missouri, November Term, 1921

Ætna Insurance Company et al., Plaintiffs,

vs.

Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, Defendant

Stipulation

Whereas, Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, has this day withdrawn and revoked the order published and declared by him on the 5th day of January, 1922, effective February 15, 1922, reducing the rates of insurance charged by all stock fire insurance companies doing busines in the State of Missouri on all fire, lightning, hail and windstorm business written by them in this State; now, therefore, it is hereby stipulated by and between the parties hereto that the following order may be entered of record in this cause:

1. The above entitled cause is hereby dismissed, and the restaining order heretofore entered therein is hereby dissolved, and all liability under the bond given pursuant to the conditions of said restraining order is hereby satisfied and discharged, and the surety on said bond is hereby released.

2. It is further stipulated and agreed that the said Superintendent of the Insurance Department, defendant herein, may, not earlier than March 15, 1922, call a hearing to investigate the necessity for a reduction in rates charged by the stock fire insurance companies doing a fire, lightning, hail and windstorm insurance business in this State; that at such hearing, if and when called, the stock fire insurance companies will appear by counsel and will produce such evidence as may be required by the Insurance Department, or they may see fit to present, bearing upon such question; that at such hearing the experience of said companies in the State of Missouri for the year 1921 shall be offered in evidence and considered by the Superintendent of the Insurance Department, together with such other

evidence as may be offered in reaching his determination; that at the conclusion of such hearing the Superintendent of the Insurance Department will make findings of fact and announce his determination thereon, and that he shall, in writing, find all essential, material and competent matters of fact disclosed by the evidence; that he shall make the following findings:

(a) What was the profit of said stock fire insurance companies during the five years preceding said investigation, including the year 1921;

(b) What is a reasonable profit on the business written in this State;

(c) What per cent of premiums received is allowed for the conflagration hazard;

[fol. 121] (d) What is the basis upon which earnings in Missouri should be determined and ascertained;

(e) What is the ratio of expenses incurred to premiums earned in this State during said period;

(f) What is the ratio of losses incurred to premiums earned in this State during said period;

(g) What is the total amount of earned premiums during said period.

3. That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

4. That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall

give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of preminums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

5. That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney-General; Merrill E. Otis, Assistant Attorney-General, Attorneys for the Defendant."

This stipulation dealt with the then situation and also looked to the future. There were four main purposes of the stimulation.

The first purpose was to dispose of the reduction order of January 5, 1922, and of the injunction suit against that order. This was covered by provisions reciting that the Superintendent had that day "withdrawn and revoked" the reduction order of January 5, 1922; that the existing injunction suit against that order "is hereby dismissed and all liability upon the bond given by the complainants therein discharged."

The second purpose was to provide for conditions attaching to a subsequent hearing as to future reductions and any order entered thereon. This was covered by provisions that the Superintendent should not call a hearing for rate reduction purposes before March 15, 1922; that when such hearing might be called, the companies would appear and produce such evidence as required and as they might desire to present; that such evidence should include the "experience of said companies in the State of Missouri [fol. 122] for the year 1921," to be considered by the Superintendent along with the other evidence introduced before him; that the Superintendent should make written findings on "all essential, material and competent matters of fact disclosed by the evidence," including seven specified matters. As to any order of reduction entered upon

such hearing it was provided that it should "apply to all classes alike."

The third purpose was to prescribe the method and only method which should be employed by the companies to test such future reduction order, with a statement of limitations and rights in connection therewith. This was covered by provisions that such test should be by a statutory review under Section 6284, before the Circuit Court of Cole County; that no injunction should be sought therein nor should the validity of Sections 6283 and 6284 or the "legality" of the hearing be raised; that until final determination of such test suit, the companies should collect existing rates, giving bond "to refund to the assured any excess of premiums collected by them" if the order "be finally sustained."

The fourth purpose was to define what should be done by the companies if the reduction order be finally sustained. This was covered by a provision requiring bond to be given, in the above test suit, "to refund to the assured any excess of premiums collected by them" (the companies).

What occurred after the stipulation was executed was as follows: The first purpose was fully performed by both parties—the reduction order of January 5, 1922, was withdrawn; the injunction suit was dismissed and the bond given therein satisfied and discharged.

The second purpose was substantially carried out. After March 15, 1922, such hearing was had and the order of reduction (October 9, 1922), now in question, was entered by the Superintendent. Complainants' only claim that the Superintendent failed fully to follow the stipulation is that he failed to make any of the seven specific findings required there. Rather strangely, only a small portion of the order (the part ordering the reduction) is before us, either in the pleadings or the proof. When the review of this order (under Section 6284) was before the Supreme Court of Missouri, the opinion therein sets forth some of the findings of the Superintendent and epitomizes others. In the epitome, it is said "The order recites further that, notwithstanding his request, the insurance companies refused to furnish the information agreed upon" in the stipulation (315 Mo. 113, 122; also see opinion in same case in Supreme Court of the United States, 275 U. S. 440, 444). The portion of the order quoted in that opinion shows that some

of the specific findings required by the stipulation were made by the Superintendent (315 Mo. 113, 122-123). The only evidence properly before us is a single sentence in the affidavit of Paul W. Terry to the effect that the Superintendent "did not * * * make the findings specified in sub-divisions (a) to (g) of paragraph 2 of said stipulation." Because of the character and importance of this controversy and because of our knowledge (from the State Supreme Court opinion) that this statement in the affidavit is not, in all respects, accurate and because that opinion reveals the possible existence of a legal excuse for not making such findings (that the companies refused information), we would be justified in reopening the case for further testimony as to this alleged failure of the Superintendent in relation to these findings required by the stipulation. This, however, is unnecessary because the undisputed evidence is that such deficiency, if it existed, was waived by the companies. This waiver is shown by their conduct after the action, or lack thereof, of the Superintendent was fully known to them. When that knowledge was theirs, they had the right, if the Superintendent had, without legal excuse, failed to comply with the stipulation, to repudiate the stipulation and freely take such action as they desired. [fol. 123] They elected to proceed in accordance with the stipulation. They not only initiated the statutory review proceedings, but omitted any attack upon the validity of the statute or the legality of the proceeding before the Superintendent; gave the bond stipulated and collected the premiums stipulated. Their course through the state courts followed the stipulation. Therefore, we must regard the matter before the Superintendent as having been fully performed, in a legal sense, by the Superintendent in accord with the stipulation because the only alleged failure upon his part has been waived.

The third above purpose of the stipulation was fully carried out by both parties.

The fourth purpose became active because the final determination was against the companies. The State Supreme Court upheld the order of reduction and the Supreme Court of the United States declined to interfere. The judgment of the State Supreme Court has become final. Nothing remains to be done by anyone, under the stipulation, except for the companies to repay the 10% excess of premiums

collected to those from whom they were collected. One of the expressed purposes of the present complaints is to prevent this repayment.

This being the situation at the time these complaints were filed, at the hearing and at present, are the defendants justified in asking that this Court grant no relief until complainants have performed their remaining part under the stipulation and repaid these excess premiums collected?

Complainants attack the stipulation from several angles. They say it is without consideration; that it lacks mutuality; that the companies were under duress; that it was violated by the Superintendent; that it has no application to the present suits; that it is invalid if it be construed to prevent bringing of the present suits; that the present suits are no violation of the stipulation because the attacks herein on the statutes are based upon the construction thereof by the State Supreme Court.

The contention as to lack of performance by the Superintendent has been disposed of above.

The argument as to lack of consideration is based, principally, upon the claim that the advantages given by the stipulation to the companies were legal rights thereof. They say the revocation of the reduction order of January 5, 1922, was no consideration because that order was a nullity as it had been made without notice or hearing; that the stipulation provision for a hearing before any future reduction order be made was no consideration because they had a constitutional right to a hearing; that the provision that future reduction order should be tested by the statutory review proceedings gave nothing as the statute accorded the right to such form of review; that the provision allowing, pending the review proceedings, collection of existing rates was no consideration because void as being beyond the power of the Superintendent—the statute requiring the reduced rates to be applicable during the review. It is not necessary to examine and determine each of these contentions. It is enough to say that the stipulation actually secured for the companies definite benefits all of which they received. They escaped litigation concerning the reduction order of January 5, 1922, with the expenses and hazards thereof. They secured a delay of a month (February 14, 1922, the date of the stipulation, until March 15, 1922) of any action by the Superintendent

during which they received the existing premium rates. They secured the procedure as to hearing and review which, apparently, was satisfactory to them and which included collection and retention, pending the review, of the excess rates. They have had the benefit of that excess collection and have it yet. To say that positive and decided benefits did not flow to the companies through the stipulation does [fol. 124] not accord with the facts. That the companies might have successfully litigated the order of January 5, 1922, or the present order has no effect upon the validity of the stipulation now fully performed by the other party. An obvious purpose of the stipulation was to determine and agree upon a definite course of action which would avoid litigation as to the first order and confine litigation as to the second one. The claim that the Superintendent had no power to agree to collection and retention of the excess pending the stipulated review is beside the mark because the companies have received the entire benefit of that provision which is fully executed. We have no doubt as to the sufficiency of the consideration.

The contention as to lack of mutuality is not much pressed. It is coupled and presented with the claim of lack of consideration. We can see no basis for any contention that there were not mutual obligations all of which have been met or waived except the final one of repayment by the companies.

As to duress—no facts are here to support such a contention. The stipulation was fully and freely entered into by all parties.

The remaining attacks upon the stipulation are that it has no application to the present actions; that if so applicable it is invalid and that these actions are not violations of the stipulation because based upon the invalidity of the statutes as construed by the State court in the review proceedings. The obvious intent of the parties was to confine attack upon a future reduction order to a stipulated procedure. That procedure was authorized (Section 6284). The companies could and did waive resort to other forms of attack open to them. The companies recognized this meaning of the stipulation and litigated, in accordance with the stipulation, for more than five years and through every possible court. They stipulated that if that litigation were unsuccessful they would repay the excess premiums collected under the

stipulation. They made no reservations concerning the law which might be announced by any court in the course of that litigation. Even if they could now begin an entirely new and different attack upon the order of reduction such condition would not meet the claim of defendants that they are coming into a court of equity with unclean hands because they stand as beneficiaries under a stipulation respecting this very matter and which they refuse to carry out. We think this position of defendants is well taken. The underlying principle in the equitable rule of "unclean hands" is that a court of conscience will not grant relief to one who, at the time, is acting inequitably in connection with the subject matter of the controversy. We express no opinion thereon but it may be that the stipulation was not intended to or that it could not prevent the complainants bringing separate actions to attack the reduction order, either through invalidity of the statutes upon which power to make the order must rest or through defects inhering in the particular order, but the facts remain that the stipulation required repayment of the excess collections if a particular stipulated proceeding resulted adversely to these complainants; that such result occurred; that every benefit to complainants from the stipulation has been received by them; that those benefits are very substantial and that they refuse to refund. Unless they do so, they will rob the other parties to the stipulation of every possible benefit therefrom, although such parties have fully performed the stipulation upon their part. Such action by the complainants is highly unconscionable and should not be permitted by a court of equity. It is analogous to that of parties to a contract where the complainants seek to act upon a rescission of the contract while retaining substantial fruits thereof. There, a court of equity will compel a restoration of the status quo before examining the rights of the parties. Here, the complainants are seeking to avoid the effect of the stipulation while retaining every substantial benefit [fol. 125] thereof. They should comply with the stipulation and make the refunds required thereby before asking any equitable relief. When that status has been fully established they will be in position to proceed to have their rights determined and protected and not before.

It is argued that to require this repayment would result in injustice to these companies if it should be determined

later that the order was confiscatory as to them or any of them, because it would be impossible ever to recover back the repayments thus made to the policyholders. It is probable that such recovery would be impossible or, at any rate, highly improbable. But such result is no reason for granting the injunctions. If that is the result, it is one which they have voluntarily brought upon themselves. It does not excuse them nor justify this Court in disregarding a basic prerequisite to the exercise of equitable powers. The so-called "rule of convenience" which leads courts of equity to preserve a status until the rights of the parties can be determined has no application here. The situation here is that equity will not move to protect the rights of a party until that party has placed itself in a position where it can ask a court of equity for such protection. As to each of these complainants who were parties to the stipulation the prayer for temporary injunction should be denied without prejudice to renewal upon a showing of the above refund by the particular complainant seeking such renewal.

The above view as to the effect of the stipulation makes it unnecessary, at this time, to determine the other matters raised by defendants, insofar as such matters relate to these complainants which were parties to the stipulation.

Companies not Parties to Stipulation or State Review Proceedings

The remainder of this opinion, except the "Conclusion," will deal with the complainants who were not parties to the stipulation and, therefore, not subject to the above disposition. Also, these companies were not parties to the statutory review proceedings. Hence, they are not subject to any of the issues of stipulation, restitution or res adjudicata presented in the motions filed by defendants. The present complaints of such companies are to be determined upon the issues presented in those complaints and the evidence introduced.

Counsel for complainants urge ten points in their brief supporting these applications for temporary injunction. Some of these can be readily determined. Points I and II are that "This Court has Jurisdiction" and that "Plaintiff has property in Missouri within the protection of the

Fourteenth Amendment." Point IX is that "The instant proceeding is the type of proceeding specifically pointed out by the Supreme Court as the appropriate one." We have no doubt that this Court has jurisdiction and that this is a proper proceeding in which to determine the validity of this reduction order and to afford such equitable relief as is prayed and is required by the facts in order to protect any rights of each complainant under the Fourteenth Amendment. Point X is that "Irreparable injury to plaintiff will result unless an interlocutory injunction is granted." Insofar as this point may be regarded as urging the propriety of resort to an injunction proceeding to protect the rights complained of as having been violated, the point is well taken. As to whether such injunction should issue will, of course, depend upon the rights of the parties as hereinafter determined.

Points VI, VII and VIII have to do with the attack upon the reduction order of November 9, 1923. As that order was revoked before this hearing and is no longer effective, those points may be disregarded.

[fol. 126] Point V has to do with the order of October 9, 1922, and is an attack upon the validity of Section 6283. It is stated thus: "Sec. 6283, R. S. Mo. 1919, is unconstitutional."

Section 6283, R. S. Mo. 1919, contains the entire authority under which the Superintendent of Insurance of that State made the order of reduction of October 9, 1922, which is involved in these actions. It is as follows:

"Sec. 6283. Superintendent to investigate the reasonableness of rates—authority to order reductions.—The Superintendent of Insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. Any reduction ordered by the Superintendent of Insurance shall be applied, subject to his approval: Provided, that the Su-

perintendent of Insurance shall designate the class or classes to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. In determining the question of rates and profits in accordance with this article, the Superintendent of Insurance shall give proper and reasonable consideration to the conflagration liability, both within and without the state" (Laws 1915, p. 313).

This section was amended in 1923 but, as this amendment became effective after this order was made, we are not concerned with that amendment because the power to make this order must be measured by the section as it stood when the order was made (Ætna Insurance Company v. Hyde, 315 Mo. 113, 127).

This section has been under consideration of the Supreme Court of the State and of the United States (Ætna Insurance Company v. Hyde, 315 Mo. 113; same title, 275 U. S. 440) The State Supreme Court has construed it in certain respects as follows: that "profits" mean aggregate profits (p. 128); that in calculating "profits," investment earnings are not to be taken as income (pp. 129, 138), unearned premiums (pp. 132-137, 152) and interest on unearned premiums (pp. 137-141) are to be taken as income and losses and expenses paid are to be taken instead of those incurred (pp. 134, 154); that elements affecting the probable future effect of the order may be considered (pp. 142-145). The discussion of other matters in that opinion—such as excessive commissions, income tax, war tax and fraudulent losses—seem expressions as to facts rather than any construction of the statute. The Supreme Court of the United States construed Section 6283 as requiring "consideration en masse of the 'result of the earnings' of all the companies, and, upon finding an excessive 'aggregate' profit, it becomes the duty of the Superintendent to limit the 'aggregate collections' to not more than a reasonable profit" (275 U. S. at 446). That court further says: "Neither of the Sections 6283 or 6284 authorized a determination of the reasonableness of rates when applied to the business of any company" (p. 448).

Under Point V, these complainants urge several grounds of invalidity of the statute as thus construed. Some of

these may be shortly eliminated. Rather half-heartedly, the challenge of the power of the state to regulate such rates is made. That power is sustained in German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

The contention that the statute is invalid in applying only to "stock fire insurance companies" is not sound. The [fol. 127] power of the state to make reasonable classifications for purposes of police regulation is beyond dispute. The only question which can arise is as to the reasonableness of the classification made. The classification here is between fire and other forms of insurance and between stock and mutual companies. Each of the bases is reasonable and natural. Fire insurance is a distinct legal and business classification. The distinction between stock and mutual insurance companies has been approved in German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 418, and some reasons therefor- are well expressed by Judge Ragland in Ætna Ins. Co. v. Hyde, 315 Mo. 113, 150.

The contention that the section is invalid because it delegates the administration of legislative power but wholly fails to prescribe any standard, rule or guide for the exercise thereof is unsound. The wording of the statute and the construction thereof by the Supreme Court of the Nation and of the State have outlined a guide for the action of the Superintendent.

The contention is, also, that the statute is invalid in not requiring notice and a hearing prior to making reduction orders. We need not inquire whether such notice and hearing is a legal requirement because neither the wording nor any proceeding thereunder prevents such notice and hearing and both were accorded in this instance.

There remain five grounds of attack, under Point V, upon the section to be examined. The first is that the "aggregate" method required by the section is invalid because such method takes no account of the particular circumstances and facts governing the profit of the particular complainant company, but is based upon aggregate profits determined by aggregate expenses and income of all such companies in the State. The section clearly requires (315 Mo. 113, 128) and permits (275 U. S. 440, 446) only the aggregate method of ascertaining profits for the purpose of making a reduction order. Is this invalid because it takes no account of the situation as to each or a particular individual

company nor of the effect thereon of the order made? We think not. The distinction to be kept in mind is between the legislative and the judicial power. The legislature may use any reasonable method to carry out its purposes. The judiciary may then examine the results of such action upon anyone affected thereby and determine the validity of such results as to that party—such results may be judicially found to be just as to some and unjust as to others. Whether the legislative method is reasonable depends upon conditions surrounding the purpose of the legislative action. Here, the legislature desired to regulate insurance rates. Well known busines- conditions suggested the advisability of a common rate for all companies upon the same classes of risks. The legislative problem was, in a practical sense, not an individual company matter, but a composite or general or aggregate matter to be determined from general facts and circumstances rather than from individual experiences. This method of legislative procedure is old and has never, ipso facto, been judicially condemned. For years, the State legislatures enacted laws broadly fixing railroad charges at certain flat rates. The method of securing constitutional protection therefrom was not by striking down the law as a whole, but by according to each individual carrier the right to test the effect of the law upon it—if the result was confiscation, the law was invalid as to that particular company, if it was not confiscatory, it was valid as to the particular company. Such seems to be the view of the Supreme Court as to this section (275 U. S. 440, 447). Our conclusion is that the section is not invalid because it uses the aggregate method but that any company affected by a reduction order thereunder has the right to test the validity of the order when applied to it on the ground that the effect thereof is confiscatory as to it and, if such contention be sustained, to be relieved therefrom.

[fol. 128] The four remaining grounds of attack, under Point V, are based upon contentions urged to be true, even though the aggregate method be valid. One of these is really a matter not affecting the validity of the section, but pertinent to an investigation of facts thereunder. That is the claim that, in determining expenses, deduction may be made for excess commissions paid agents in St. Louis. The statute requires ascertainment of "aggregate profits" for a

five-year period for the purpose of determining a future reasonable aggregate profit. If it were an original proposition, we would say that the only requirement of the section was that the aggregate method should be employed. What matters should be considered as bearing on income or expenditure in ascertaining such "aggregate profit" would, we should think, be left to the Superintendent within the bounds of reason and law—that is, that any and all pertinent facts might be considered by him and no others. The Supreme Court of Missouri has determined that certain matters are required by the section and we accept that as a construction of the section, but it has not so determined as to this particular matter of excess commissions. Therefore, we think the only place thereof is in an examination of the facts as to the effect of the order on the particular complainant.

Another contention is that the section is invalid because the State Supreme Court construed it as requiring the deduction from expenses of federal war taxes on Missouri premiums. The only respect in which the State court can be said to have construed the section in that particular is that it determined that the Superintendent was authorized thereunder to consider future conditions which would affect any rate he might order. Any rate established by the Superintendent would be for future application. Any circumstances known or probable affecting that future would be pertinent to the inquiry (McCardle v. Indianapolis Co., 272 U. S. 400, 408-9, 412; S. W. Tel. Co. v. Pub. Serv. Comm., 262 U. S. 276, 288; Bluefield Co. v. Pub. Serv. Comm., 262 U. S. 679, 691). In the McCardle case, Mr. Justice Butler said: "In every confiscation case, the future as well as the present must be regarded" (p. 408). We think the State court was right in such construction of the statute. It is admitted that the repeal of the law levying this tax would prevent its being an expense during the period of the order, although it had been such during the prior five-year test period under examination by the Superintendent.

Two contentions under Point V remain. They are, that the section as construed, is invalid, first in that underwriting profit or loss shall be on the basis of premiums paid less losses and expenses paid, instead of on the basis of premiums "earned" less losses and expenses incurred and,

second, in that interest earnings on "unearned" premiums are included as income. As attacks upon the validity of the section, these contentions have no place in the present proceedings. Whether they would be in the statutory review proceedings under Section 6284 is not here pertinent. The present proceedings are separate complaints by certain individual companies affected by the order. The prime question before us in each of these actions is—is the order confiscatory in effect upon the particular complainant? We are concerned only with the effect of such result upon the particular complainant. If the effect of the reduction order is confiscation as to a particular complainant, the order is void as to it. If that effect is not confiscatory, the complainant is without remedy so long as the Superintendent has acted within the power conferred by the section as construed by the highest court of the State. There is no contention here that he has acted outside of such power.

In determining the matter of confiscation in the present suits, we are not bound nor affected by the statute. We are guided solely by the rules of evidence in a federal trial court in the determination of the crucial fact of confiscation vel [fol. 129] non. When a right under the Federal Constitution is in question before a federal court, it applies its own rules of evidence in the investigation of facts material to such issue. It is in that connection alone that the propriety of the paid premiums, loss and expenses or the earned premiums and incurred loss and expenses methods are to be considered and the propriety of treating interest earned on unearned premiums as income.

Our conclusion is that the statute as construed is valid in so far as these complainants can test that matter in these proceedings.

Complainants state contention IV as follows:

"It is an unconstitutional invasion of the rights of the plaintiff to base a rate reduction upon the experience of competitors of plaintiff without weighing its confiscatory effect upon the plaintiff individually."

Taking this contention as stated, it is unsound for reasons above given. No right of plaintiff is invaded by such a method per se unless it results in confiscation when applied to it. In fact, it is the result and not the method which

is important to plaintiff. Under the section, the Superintendent has power to limit the collections of each company to a reasonable amount and to do so through the medium of fixing rates. No company has a constitutional right to charge a rate which will produce more than a reasonable profit. Every company has a constitutional right to receive a reasonable profit. In its attempt to select a method of regulating such rates to produce only a reasonable profit, the State legislature has a wide choice. It is not required to treat each company separately upon its own facts. Nor is it required to consider the effect of its action upon each individual company. The only limitation is that its action must not be arbitrary to the harm of the companies. Such action is not arbitrary if it has a reasonable connection with the existing circumstances. Here, three of such circumstances are that there are a great many companies (making it impractical to consider each separately); that practical business considerations compel a similar rate for all companies (making it practical to prescribe a flat rate applicable to all and entirely impractical and, in a business sense, useless to prescribe for each company different rates dependent upon its particular experience) and that the National Constitution affords protection, through the courts, to any individual company as to which the flat rate might be confiscatory (thus furnishing relief in those instances where the flat rate might, in its application, be too low and leaving it in effect where not too low). The above circumstances would make reasonable the method of Section 6283 for determining a rate to produce a reasonable profit, as construed by the State Supreme Court.

Confiscation

The remaining contention (III) to be considered is that "The 10 per cent reduction order and the 15 per cent reduction order are each confiscatory as to each plaintiff." For reasons hereinbefore stated, we have no concern with the "15 per cent" order, which was the order of November 9, 1923, rescinded before the hearing in these actions.

Each of these complaints presents an attack upon the order of reduction because, it is claimed, the order is confiscatory as to the particular claimant. As so often happens in important rate controversies, the evidence as to this

matter of fact before us on these applications for temporary injunctions is meager, general and, in many respects, incomplete and unsatisfactory. It is largely made up of the verified bills and affidavits. The argument under point III of the brief is short and general. However, under Point V there are four matters urged which may be properly considered in connection, also with the question of confiscation because they deal with general matters applicable to all of [fol. 130] the cases and have direct bearing upon some of the facts and upon the bases which should be kept in mind in determining the ultimate and controlling fact of existence or non-existence of confiscation. After discussing these four matters we can examine and apply the facts in each particular case. Of these four contentions, two are, perhaps, of less practical importance. They are the war tax and the excess commissions to agents in St. Louis.

War Tax

This matter involves the propriety of eliminating the federal tax from expenses of the companies. During the particular five-year test period (1917-21, inclusive) involved in the investigation of the Superintendent under Section 6283, the companies were subject to and paid a federal war tax. This expenditure properly appeared as an expense during that period. That tax was repealed by the Act of November 23, 1921 (42 Stat. 227, 321). Under the reduced rate, there would, of course, be no such tax and no such expense. Therefore, the Superintendent was authorized, under Section 6283, and we are authorized, by recognized rules of law in rate cases (McCardle v. Indianapolis Co., 272 U. S. 400, 408-9; S. W. Tel. Co. v. Pub. Serv. Comm., 262 U. S. 276, 288; Bluefield Co. v. Pub. Serv. Comm., 262 U. S. 679, 691), to eliminate that as an item of expense in considering the effect of the reduction order upon these complainants.

Excess Commissions

The excess commissions paid agents in St. Louis came into the controversy in this wise. In determining what the aggregate profit of the companies was, the Superintendent deducted from their expenses certain excess in commissions paid by them to their agents in St. Louis. It is con-

ceded that agent commissions in St. Louis ran about 5% in excess of commissions paid in other places in the state. It is claimed by the companies that they were forced to pay this excess by business conditions in St. Louis. Those conditions were that brokers controlled the placing of a large portion of the insurance written and they charge the insurance agents a commission for placing the business with them. In a rate investigation, items of expense may be examined to ascertain whether they are in part or as a whole proper. On one hand, a company must have a wide discretion in the management of its own business, but, on the other hand, it cannot make expenditures which are clearly unnecessary and pass such into a rate charge. Its business must be "well and economically organized and carried on" (Aetna Ins. Co. v. Hyde, 275 U. S. 440, 448). From the meager showing in this record, we cannot say that this expense is so unreasonable that it should be eliminated. The real vice is that this excess is spread over upon other business in the state which did not cause it while the burden is, thereby, lightened on the very business which has caused it. We see no reason why the Superintendent could not, under the statute, have made a difference in the rates as applied to St. Louis which would have placed this burden where it belonged. This was not done. In considering the expenses of each of these complainants, we think these excess commissions should not be deducted from the expenses of such of these complainants as paid them. Whether fuller evidence upon this item might justify its exclusion is a matter we cannot determine now.

Rate Basis

Two contentions remain to be considered. One is that profit should be determined by consideration of the "earned" premiums and the incurred losses and expenses instead of paid premiums and paid losses and expenses. [fol. 131] The other is whether interest upon "unearned" premiums should be included as income. In a practical sense, these are the most important contentions in these cases—as stated in complainants' brief, it is "the basis upon which its bill rests" and, as stated in the opinion of the Supreme Court in the statutory review proceedings of

this order, "the controversy concerns the basis on which the findings were to be made" (275 U. S. 440, 446).

The object is to ascertain the "profit"—this naturally represents the difference between income and expenditures. The parties differ as to what is the basis for computing income and, also, as to the basis for computing expenditures.

The difference as to income is whether the basis should be premiums "paid" or premiums "earned." Premiums "paid" means such as are actually paid by the insured to the insurer during a given test period. Premiums "earned" requires more extended definition. Therefore, before entering upon a determination as to these contending bases as to "income," it is advisable to state a definition of the terms "earned" and "unearned" premiums and the place and use thereof in the fire insurance business. The fire insurance business is not one of dealing in commodities or things, but of furnishing a service. That service is indemnity from loss by fire. Such service is based upon contracts whereby the insurer assumes the obligation to indemnify. The consideration for this obligation is a payment by the insured therefor. This payment is called a premium.

As soon as a premium is paid and the indemnity is in force, the premium becomes the absolute property of the insurer. It is the price and compensation paid for the indemnity obligation assumed by the insurer. It has been finally earned in every sense of that word by the binding contract obligation to indemnify. Therefore, the terms "unearned" and "earned" premiums are inaccurate unless the sense in which they are used is understood. Those terms are used in two connections: cancellation of policies and the protective reserve. Policies usually provide for payments by the insurer to the insured upon the happening only of either of two contingencies: loss within the policy and cancellation of the policy. The former is the indemnity contracted for; the latter is the amount to be paid if the policy be cancelled by either party while it is in force. Neither loss under the policy nor cancellation is a certain matter. Each is entirely contingent. Either or both may never occur and, in fact, it is because such occurrence is the exception that the insurance business is a possibility.

As to cancellation of policies. From the lack of stress placed by counsel upon any effect on an insurer through cancellation of policies, it is fair to assume that it is negligible. However, because we are dealing with terms which need definition and because those terms are used in connection with the cancellation of policies it is well to ascertain their use and meaning in that respect. Policies provide for cancellation by either party during the life of the policy. The premium is paid for indemnity during the full term of the policy. As cancellation terminates the indemnity liability of the insurer before the full term for which the insured has paid, policies provide for repayment of that proportion of the premium which paid for the term remaining after cancellation. As one of the bases of the amount of premium paid is time (the rate relatively decreasing as the term of insurance increases), determination of the amount to be repaid, upon cancellation, depends partly upon which party declares cancellation. To prevent the insured securing short term protection at lower long term rates, if he cancels he is paid the difference between the premium paid and the short time rate for the time he was protected. To prevent the insurer forcing short time rates on an insured who has contracted for long term rates, if the insurer can- [fol. 132] cels, the payment is the long term rate on the term remaining after cancellation. To designate these amounts which must be paid the insured, upon cancellation, they are called "unearned" premiums, while the premium for the term before cancellation is called "earned" premium. Such payment to the insured is not a return, in specie, of any part of the premium paid and the contract for cancellation does not establish any trust or similar relation regarding the premium. It is merely a contract obligation wherein the amount to be paid the insured has relation to and is, in part, measured by the amount of premium paid for the policy.

As to the reserve. This has to do with losses under the policies. Although such losses are the exception, they occur. They may happen at any time upon any of such contracts and should, under the contract, be promptly paid. The insurer must be always in a financial position to make such payment. Good business intelligence and integrity

would require the maintenance of a liquid fund proportioned to the existing risks. When an insurance business starts, this fund is provided by the capital stock. State statutes usually require a minimum capitalization. As the business grows and the total of assumed risks increases, the fund must be correspondingly increased. Well managed companies carry such "surplus" as seems advisable for such purpose. Naturally, the management of companies would differ as to how much of its income (including premiums) should be thus reserved and how much paid out in dividends. To assure a sufficient reservation for the protection of the policyholder, the states have enacted laws. The basic thought in most of such laws is to secure this protection through reinsurance in some other and solvent company. This is worked out by requiring a fund sufficient for that purpose. As premium rates are the same in all companies—by law or by business necessity—the premiums for the unexpired terms of the policies are sufficient for the above purpose. Hence, the usual requirement is that the fund at all times equal the premiums on the unexpired terms of the policies in force. To describe this amount, it is called the "unearned" premium. The balance of the premium si called "earned" premium. This term "unearned" premium does not mean that the entire premiums have not been earned in the sense that they are absolutely the property of the insurer. It does not mean that the insurer must take nine out of every particular ten dollars paid as a premium on each policy and set that specific nine dollars aside. It does not mean that any trust or agency or other legal relation exists as to any part of any specific premium. What it does mean is that the insurer shall have and keep a fund of that amount constantly available for that purpose and that purpose alone. In short, it cannot distribute that much of its assets in dividends nor use it for other corporate purposes. In order to be sure that this fund is secure, different requirements are made. Some states require this segregation to be by physical deposit of approved securities in designated depositories. Ordinarily, it is merely a matter of bookkeeping by the insurer, enforced by examination of its books and securities by representatives of the state.

Having in mind the above meaning of the terms "earned" and "unearned" premium, we return to the contention between the parties. Plaintiffs contend that income should be based upon the "earned" premiums alone and that no account should be taken of the "unearned" premiums; defendants contend for paid premiums, which would include both "earned" and "unearned" premiums, together with interest received by the companies from investments representing the "unearned" premium. Comparison of these two contentions reveals two real points of difference. The first of these is whether "unearned" premiums shall be included in income. The second is whether interest upon invested "unearned" premiums should be included.

[fol. 133] While by no means unimportant, it is well to get the matter as to interest out of the way before reaching the main issue—inclusion of "unearned" income. The interest on "unearned" premiums should not be included as underwriting income.

The principal business of an insurance company is in assuming risks in return for pay. To assure prompt performance of its contracts it must build up and keep on hand funds necessary for that purpose. One source of profit is the investment of that fund to produce an income. That fund must be fairly liquid, so the result is that such investment usually takes the form of readily marketable interest bearing securities. This interest is the above profit. Thus, an important branch of such business is the investment of its funds. While the various states require a minimum fund (amount to reinsure) yet prudent management dictates a yet larger amount. Thus, the best companies have built up and maintain a "surplus" which represents funds not legally required as a reserve and which might be used for any corporate purpose, including dividends. For the most part, this surplus is the result of receipts from premiums. All parties here concede that such surplus and the income therefrom is not to be considered in estimating income for rate making purposes under the Missouri statute. Yet the defendants contend that the interest from the "unearned" premiums should be so included. Such interest is alone the result of investment by the company and is not the result of state requirement. That in-

vestment is not different in character and purpose from that of the "earned" premiums or of any other assets of the company.

As soon as a premium is paid, it becomes the absolute property of the company and subject to investment by it. Premiums are coming in daily. They are mingled with other funds from other sources and invested together and alike. The fact that money comes from "earned" or "unearned" premiums or other sources has and should have nothing to do with its investment. All income property of the company, except the contributions from its stockholders, is directly or indirectly traceable to premiums. To say that earnings on some recently paid portion of premiums are so-called underwriting profit while earnings on more remote portions are investment profits is a purely artificial distinction. To base this upon "unearned" premiums is no more real because "unearned" premiums is merely the name for the measure of the fund which is required to be kept to secure the indemnity contracts—there is no logical nor practical connection between the two thoughts. Therefore, because the premium when paid is the property of the company; because the interest arises from investment of such property; because there is no basis for such result in the fact that a reserve must be maintained (measured by the premium required to reinsure), and because it is conceded that the income from the investment part of the business should not be considered in a rate making base under this statute we think there is no ground for holding that interest from "unearned" premiums should be included as "income" for rate making purposes in these cases. Whether it could be included without violating constitutional guarantees is not in these cases and not considered herein.

The next matter is whether "unearned" premiums should be excluded as income. Plaintiffs urge this should be done because, they say, such premiums are not theirs to do with as they wish and may never be theirs. As soon as a premium is paid it is the property of the company. The company invests it precisely as it does any other monies it may have. The insured has parted with it completely. He has no kind of legal or equitable interest therein. All that he

has is the contract obligations of the policy. It is true that business prudence and State regulation require the maintenance of a fund to secure the performance of such outstanding contracts and that this fund cannot be used for other corporate purposes nor distributed as dividends. It is true [fol. 134] that, should the company become insolvent, this fund (in so far as State required) would be used for reinsurance and lost to the company. But the very nature of the business necessitates such a fund and such possible use thereof. And, all the while, this necessary fund is producing for the company the same income as from its other investments. The fact that the reserve fund cannot be used for corporate purposes nor distributed in dividends is not at all conclusive. From the nature of the business it would not be so used or distributed and no prudent and honest corporate management would ever think of such use or distribution. Therefore, that argument is purely theoretical and has no practical value.

Another consideration is as follows: It is obvious that the object of an insurance company is to make money out of premiums. It is organized and exists for that purpose. Clearly, the greater the volume of business, the greater should be the profit. In fact, most companies must operate at a positive loss until profit from the volume of business overcomes expenses. The greater and faster the business volume increases, the more expense required to produce it and the greater relative amount of "unearned" premiums necessary to protect that volume. If "unearned" premiums are to be excluded from calculation of income and profits, there is the anomalous result of an increasingly prosperous business in fact and an increasingly unprosperous business in theory. Take an illustration of a single piece of business. The day after a policy is paid for and in force, the amount required to reinsure it would be practically the entire premium paid, since only one day of the insured period has run, and this required amount would be "unearned" premium. It required expense to produce that policy—agent's commission, etc. If "unearned" premium is to be excluded, the company has had a heavy loss on that policy at that time. Yet the company makes its money by getting such policies and going through such experiences as to policies and premiums.

This seems to us to be an unsound theory based upon conditions which do not exist in fact.

On the contrary, premium "paid" represents money actually coming in from the business of underwriting and actually becoming the property of the company and subject to its investment and resulting profit therefrom. We think premium "paid," without interest on "unearned" premiums, is the proper and actual basis for income in rate making under this statute. This disposes of that part of the controversy over the rate bases, which related to income.

There is, as said above, a controversy, also, as to the basis for expenses and losses which shall be used. Defendants contend that losses and expenses "paid" during the test period should be used. The word "paid" requires no definition. Plaintiffs contend that losses and expenses "incurred" during the test period should be used. By losses "incurred" they mean "those which happened during the periods and for which liability became firmly fixed during the period" (Brief, p. 14). The difficulty with this latter method is not in its theory but in its practical application. If by "liability became firmly fixed during the period" is meant merely where the loss occurs during the period, then it would, in practical application, require some estimate of losses not fully adjusted or accepted within such period although such are frequently subject to wide ranges between amounts claimed by insured and those conceded by the insurer and sometimes the liability is denied entirely and often the difference hinges on complicated facts requiring extended presentation and much evidence. This would afford opportunity for important differences as to how such amounts should be determined and by whom determined and require extended investigation to be more than a wild guess and, at very best, would be merely and solely an [fol. 135] "estimate" or matter of opinion. However, the expression quoted evidently means something more than the mere occurrence of the loss under the policy within the period. It means that the amount of loss has been "firmly fixed," by judgment in a court within the period or by action of the parties within the period. In practical application, this would entirely eliminate all losses occurring near the end of a period which were not "firmly fixed" within

the period; all losses so occurring near the end of the preceding period and all losses passing into litigation or extended negotiation reaching beyond the particular period of occurrence. This method would exclude all of the above classes from inclusion in any period. These classes are nit inconsiderable and, obviously, they should be included at some time because they are actually paid by the insurer.

While the losses "paid" method, urged by the defendants, will not accurately represent the losses occurring within a given period, because it will include payments for some losses occurring prior to the period and will exclude some losses occurring during the period but not "firmly fixed" within the same period, yet there is no reason to think that ordinary losses and actual payments thereon will not normally pretty fairly equalize from year to year, and, moreover, the payments will be actualities instead of guesses or estimates. This is even truer where the test period extends over a term of consecutive years as here (the statute requiring five years). The extraordinary losses (so-called "fire hazard") are taken care of in the rate by an addition thereto for that particular purpose. While neither method is perfect in application, the paid method seems more practical and entirely fair to the companies as it includes all losses—a thing which the other method could not do.

As to underwriting expenses and as to payments on account of policy cancellations, the amounts due are almost always subject to definite and immediate statement and might well be subject to either the "incurred" or the "paid" method. Because we doubt if there would be appreciable difference between these two methods, from year to year, and merely for uniformity, we think it would be better to have them follow the method adopted as to losses.

Summary

Our conclusion as to proper basis for rate purposes is that it should be based upon underwriting income and upon losses, cancellation payments and underwriting expenses; that such income should consist of paid premiums alone without interest from any source; that losses, cancellation payments and underwriting expenses should be taken upon the paid method; that, in these cases, it is proper to con-

sider the effect upon expenses (in determining confiscation) of the repealed war tax and, under the evidence now here, it is not proper to consider the so-called excess agency commissions in St. Louis.

The Evidence

Having attempted to examine and determine all of the contentions which are generally applicable to all of these cases, consideration next is to be given to the particular evidence in each case to determine whether that evidence establishes confiscation as to the particular plaintiff. Examination of the petitions reveals that they are all drawn upon the theory, common with the plaintiffs, that the basis for determining confiscation is the exclusion of "unearned" premiums from income and the treatment of losses and expenses on the "incurred" theory. All of the evidence of facts relating to or bearing upon confiscation is of that char- [fol. 136] acter whether in the verified petitions, in affidavits or orally given. We think that basis is unsound. Evidence purely of that character is no guide nor help in determining confiscation in the way which seems to us proper. In short, there is no evidence from which confiscation could be found in any of the cases. The burden of proving confiscation has not been met. Ordinarily, the result from such failure would be denial of temporary injunctive relief. However, there are other considerations bearing upon the matter. The failure of proof here arises from a mistake as to the basis of or line of evidence and not from inability to produce proof along proper lines. The defendants have offered no evidence of facts to refute the claim of confiscation. This is not stated as a criticism, for counsel might rely upon the weakness of plaintiffs' evidence to sustain the burden of proof. It is stated to make clear that neither party has introduced and this court has before it in these hearings no evidence which properly bears upon confiscation in any of these cases. Yet the court knows that there is much, very much, evidence upon this crucial matter. With the bases for such inquiry determined, the parties will produce this evidence—for and against confiscation. It is impossible to anticipate that proof.

The issues in these cases are grave and are seriously urged and of far-reaching consequence. If the injunctions

be denied until final decree, there might result substantial and irreparable loss to each of these plaintiffs because the recovery of ten percentum of each premium from each policyholder upon each policy is impractical, if not impossible. The expense thereof is prohibitive when the amount of each recovery is considered. On the other hand, the premium payers can be protected at the same time that the companies are. This can be done by granting the applications for temporary injunction properly conditioned as to bond or deposit in court. This is the method and procedure applicable and approved by the Supreme Court (Ohio Oil Co. v. E. A. Conway, Supervisor, decided March 5, 1929).

Conclusion

Allowance of the applications for temporary injunctions (upon conditions protective to premium payers) of all plaintiffs which were not parties to the stipulation.

Denial of applications, without prejudice of renewal upon a showing of repayment under the stipulation, of all plaintiffs which were parties to the stipulation.

Addendum to Opinion

At conclusion of reading of the opinion in the above cases, counsel called to the attention of the court the matter of the effective date of the order of the Superintendent. The court is indebted to counsel for the suggestion. The members of the court have not overlooked this point in the briefs. However, in reaching the determination that the plaintiffs (parties to the stipulation) should not now be heard and that the plaintiffs (not parties to the stipulation) should be granted injunctions in order to maintain the status quo until the merits could be determined, there was no necessity to dispose of that question and the court purposely omitted to do so.

Later, when the court came to work out the mode of making its determinations effective, that matter was lost sight of inadvertently except that an effective date was placed in the tentative suggestiins as to form of order relating to the parties not signing the stipulation.

[fol. 137] The suggestion of counsel is well made. It is necessary to state our views upon this matter in order to

enable the parties (signing the stipulation) to know the amount of refund necessary and the parties (not so signing) to know the amount of bond necessary.

According to the order, it became effective on November 15, 1922. The statute (Sec. 6283) gives the companies thirty days after a reduction order is made within which time they may apply the reduction to particular classes of insurance to be approved by the Superintendent, and, failing so to do, the Superintendent shall make such application. It is thus clear that an order of reduction is not fully in force until such designation is made in one of the above ways. Here no such designation has ever been suggested by the companies and the Superintendent did not make such until February 1, 1928, when he made the rate applicable to all classes. The contention made by plaintiffs is that the order was not in force until the designation on February 1, 1928. The stipulation expressly provided that any such order should apply to all classes. The stipulation amounted to a designation in advance in so far as the parties thereto were concerned. The companies, which were parties to the stipulation, as well as the Superintendent, treated the rates as in effect, under the stipulation, without any such designation. No review could be had under Section 6283 until the order was binding. The parties pursued the remedy given by that section. Unless and until the order became effective there was no need for the stipulated bond. Yet, it was given when the review proceedings (under Section 6284) were initiated in the sum of $500,000 and, as stated in the petitions herein, "the terms of said bond to said defendant Hyde, for the use and benefit of all persons, firms and corporations to whom policies of fire, lightning, hail and windstorm insurance, covering property in the State of Missouri, may be issued * * * on and after November 10, 1922, and prior to the entry of a final decree in said cause." Also, as these collections increased, additional bond was given by such plaintiffs in a like amount, prior to February 1, 1928. The only explanation of such conduct is that all parties understood the stipulation to settle the matter of designation of classes. Such plaintiffs cannot now take a directly opposite position. They are estopped to deny that the order was not

in effect as to them from the effective date (November 15, 1922) provided in the order itself.

The plaintiffs here which were not parties to the stipulation are in a better position. They can require an absolute compliance with the statute. As to them the order did not become effective until February 1, 1928.

[fol. 138] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 139 & 140] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 31, 1929

Comes now appellant and adopts its assignments of error as its statement of the points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Appellant.

Service of the foregoing statement of points relied upon and designation of parts of the record to be printed is acknowledged this 28th day of May, A. D. 1929.

J. T. Barker, Floyd E. Jacobs, Solicitors for Appellees.

[fol. 141] [File endorsement omitted.]

Endorsed on cover: File No. 34,230. W. Missouri D. C. U. S. Term No. 104. National Fire Insurance Company of Hartford, appellant, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri. Filed May 22nd, 1929. File No. 34,230.

FILE COPY

Office Supreme Court, U.S.
FILED
JUN 10 1929
CHARLES ELMORE CROPLEY
CLERK

No. 104.

In the Supreme Court of the United States

October Term, 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
Appellant,

vs.

JOSEPH B. THOMPSON, Superintendent of the Insurance Department of the State of Missouri, and STRATTON SHARTEL, Attorney General of the State of Missouri,
Appellees.

APPELLANT'S STATEMENT AS TO JURISDICTION ON APPEAL.

ROBERT J. FOLONIE,
WILLIAM S. HOGSETT,
JOHN S. LEAHY,
ASHLEY COCKRILL,
Solicitors for Appellant.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

In the Supreme Court of the United States

October Term, 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
Appellant,

vs.

JOSEPH B. THOMPSON, Superintendent of the Insurance Department of the State of Missouri, and STRATTON SHARTEL, Attorney General of the State of Missouri,
Appellees.

No. 104.

APPELLANT'S STATEMENT AS TO JURISDICTION ON APPEAL.

May it please the Court:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court is sustained by the following statutory provisions:

Section 266 of Judicial Code as amended by Act of February 13, 1925 (Section 380 of Title 28, U. S. Code).

Section 238 of Judicial Code as amended by Act of February 13, 1925 (Section 345 of Title 28, U. S. Code).

Section 266 of Judicial Code as amended by Act of February 13, 1925 (Sec. 380 of Title 28, U. S. Code), provides in part as follows:

> "Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such

application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * *"

Section 238 of Judicial Code as amended by Act of February 13, 1925 (Sec. 345 of Title 28, U. S. Code), provides in part as follows:

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following sections and not otherwise:

* * * * * * * *

(3) Section 380 of this title.

* * * * * * * *"

B.

Date of Order Reviewed and Date of Application for Appeal.

The order sought to be reviewed was entered on the 13th day of April, 1929 (R. 60-61).*

The application for appeal was presented on the 26th day of April, 1929 (R. 62-64).

C.

Nature of Case and Ruling Below.

This is a suit in equity to restrain the enforcement, operation and execution of a statute of Missouri (Section 6283, R. S. Mo. 1919), by restraining the action of the Superintendent of the Insurance Department and the Attorney General of Missouri in the enforcement and execution of said statute, and in the enforcement and execution of a rate reduction order made by said Superintendent of the Insurance Department acting under and pursuant to said statute (R. 2-13, 21-24), on the ground of the unconstitutionality of said statute (R. 7-13, 23). Said order of the Superintendent was an order of "an administrative board or commission" within the meaning of Sec. 266 of Judicial Code (*Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 320). This appeal comes direct to this Court from the order of the United States District Court for the Western District of Missouri (three judges sitting), which court after notice and hearing denied an interlocutory injunction in said cause (R. 60-62).

*All references to the Record are to the pages of the certified unprinted Record prepared by the Clerk of the United States District Court for the Western District of Missouri and on file with the Clerk of this Court. The Record has not yet been printed.

The suit is one by the appellant, the National Fire Insurance Company of Hartford, against the appellees, the Superintendent of the Insurance Department and the Attorney General of Missouri, to enjoin the enforcement of an order of the Superintendent promulgated October 9, 1922, reducing insurance rates in Missouri 10 per cent (R. 2-12, 21-24). The District Court had jurisdiction because the amount involved exceeds $3000.00 (R. 3), appellant is a citizen of Connecticut while appellees are citizens of Missouri (R. 2-3), and questions arise under the Fourteenth Amendment (R. 7-8, 9-13, 21-22).

By appellant's verified bill the rate order is attacked as confiscatory and in violation of the due process clause of the Fourteenth Amendment (R. 7-8, 41); and the rate statute aforesaid is attacked as being in violation of the due process clause (R. 8-9, 10, 11, 12, 13, 23) and the equal protection clause (R. 9, 12, 13, 23) of the Fourteenth Amendment. The bill prayed for a temporary restraining order, interlocutory injunction and permanent injunction restraining appellees from enforcing the order (R. 23-24). In addition a separate application for interlocutory injunction was filed (R. 29, 44).

Upon the verified bill the judge of the District Court, finding that irreparable loss and damage would result to the complainant unless a temporary restraining order was granted (R. 27), granted such order restraining appellees from enforcing the rate order until the hearing and determination of the application for an interlocutory injunction upon notice (R. 27-29, 33). More than five days' notice of the hearing was given to the Governor and Attorney General of the State and to the defendants (R. 29, 44, 111).

The hearing upon the application for interlocutory injunction was had (all parties appearing) before three judges (R. 61, 78) in accordance with Section 266 of Judicial Code as amended by Act of February 13, 1925 (Section 380, Title 28, U. S. Code), and an order was entered denying an interlocutory injunction, without prejudice to plaintiff's right to renew its application upon a showing that it has repaid the excess of 10 per centum collected on premiums for fire, lightning, hail and wind storm insurance on Missouri business since November 15, 1922, and up to the date of the renewal of such application (R. 61). From the order denying interlocutory injunction the appellant within thirty days (R. 60-62) applied for (R. 63-64) and was allowed (R. 70) a direct appeal to this Court.

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Ohio Oil Co. v. *Conway,* 49 Sup. Ct. Rep. 256.
United Fuel Gas Co. v. *Public Service Commission of West Virginia,* 49 Sup. Ct. Rep. 157.
Tyson and Brother v. *Banton,* 273 U. S. 418, 428.
Herkness v. *Irion,* 49 Sup. Ct. Rep. 40, 41.
Rail & River Coal Co. v. *Yaple,* 236 U. S. 338, 342.
St. Louis-San Francisco Ry. Co. v. *Middlekamp,* 256 U. S. 226, 228-229.
Ohio Tax Cases, 232 U. S. 576, 578.
Clark v. *Poor,* 274 U. S. 554, 556.
Ex parte Buder, 271 U. S. 461, 464-5.
Board of Public Utility Commissioners v. *New York Telephone Co.,* 271 U. S. 23, 26.

Lawrence v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588, 589-590.
Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245, 249.
Banton v. *Belt Line Ry.*, 268 U. S. 413, 415.
Airways Electric Appliance Corp. v. *Day*, 266 U. S. 71, 79-80.
Wallace v. *Hines*, 253 U. S. 66, 67.
Looney v. *Crane Co.*, 245 U. S. 178, 186-7.
Rast v. *Van Deman*, 240 U. S. 342, 351.
Gilchrist v. *Interborough Rapid Transit Co.*, 49 Sup. Ct. Rep. 282.
Williams v. *Standard Oil Co.*, 49 Sup. Ct. Rep. 115, 116.
Cline v. *Frink Dairy Co.*, 274 U. S. 445, 449, 451.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Sections 238 and 266 of Judicial Code as amended by the Act of February 13, 1925 (Sections 345 and 380 of Title 28, U. S. Code).

Respectfully submitted,

ROBERT J. FOLONIE,
WILLIAM S. HOGSETT,
JOHN S. LEAHY,
ASHLEY COCKRILL,
Solicitors for Appellant.

FILE COPY

No. 104

FILED
OCT 5 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
Appellant.

vs.

JOSEPH B. THOMPSON, Superintendent of the Insurance Department of the State of Missouri and STRATTON SHARTEL, Attorney General of the State of Missouri,
Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

ROBERT J. FOLONIE,
JOHN S. LEAHY,
WILLIAM S. HOGSETT,
ASHLEY COCKRILL,
COUNSEL FOR APPELLANT.

HARKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

INDEX.

	PAGE
Published report of opinion below	1
Grounds upon which jurisdiction of this Court is invoked	1
Statement of the case	2
Specifications of errors relied upon	15
Summary of argument	16-23
Argument	24
I. Refusal of interlocutory injunction operates as denial of due process. The court below abused its discretion	24
II. The sound method of calculating insurance profit is upon the earned and incurred basis. The paid basis employed is arbitrary and fundamentally unsound	29
III. No estoppel exists against appellant, because superintendent abandoned and did not follow stipulation	37
IV. Charge of preexisting rates by appellant was not creative of waiver or estoppel	40
V. The doctrine of barring recovery for want of clean hands is not applicable to appellant. The Court misconstrued the stipulation	44
VI. The stipulation did not fix status of insurance rates. Stipulation lacking in binding force	55
VII. Duress—supposed waiver in advance of confiscatory acts no bar to action of appellant	56
VIII. Agreement in advance to waive constitutional rights not yet affected will not bar assertion of them when they are infringed	64
IX. Missouri statute violates equal protection clause of Constitution	68

PAGE

X. Action of state not warranted under police power. Consideration of German Alliance case 68

XI. Questions of controlling importance should be reserved to final hearing and not now determined against appellant 76

XII. Abuse of discretion in requiring return of premiums back to November 15, 1922 instead of February 1, 1928 80

TABLE OF CASES.

Aetna Ins. Co., *et al.* v. Hyde, *et al.*, 275 U. S. 440 ....5, 41, 78

Atchison, Topeka & Santa Fe Railway Company v. O'Connor, 223 U. S. 280 .....20, 62, 64

Banton v. Bell Line Railroad, 236 U. S. 414 .....21, 65

Barron v. Burnside, 121 U. S. 186 .....21, 65

Bluefield Water Works and Improvement Company v. Public Service Commission, 262 U. S. 679, 690 ....16, 25

Bullion v. Aetna Insurance Company, 151 Ark. 519, 237 S. W. Rep. 716 .....17, 36, 37

Burnham v. North Chicago Street Railway Company, 88 Federal Reporter 627 .....19, 54

Coe v. Armour Fertilizer Works, 237 U. S. 413, 424.....27, 58

Cook on Corporations, Vol. 2, 7th edition, Section 546, page 1609 .....17, 37

Doyle v. Continental Insurance Company, 94 U. S. 534, 535 .....21, 22, 66, 72

Fletcher Encyc. on Corporations, Vol. 6, page 6104 .....17, 37

Gaar Scott & Co. v. Shannon, 223 U. S. 468.....20, 64

Hanover Fire Insurance Company v. Harding, 272 U. S. 494 .....22, 68

Hope Mutual Life Insurance Company v. Perkins, 4 Rob. (N. Y.) 182 .....17, 37

Insurance Company v. Morse, 20 Wallace 445 .....21, 65

PAGE

Insurance Company v. Page & Richardson, 17 B. Monroe (Ky.) 412 ..... 17, 37

Interstate Commerce Commission v. Union Pacific Railway Company, 222 U. S. 541 ..... 17, 35

Kenton Insurance v. Covington, 86 Ky. 213 ..... 17, 37

McFarland v. American Sugar Company, 241 U. S. 79, 85 ..... 21, 67

Myles Salt Co. v. Iberia Drainage District, 239 U. S. 484 55

Northwestern National Insurance Company v. Fishback, 130 Washington 490 ..... 22, 74

Ohio Oil Company v. Conway, 49 Sup. Ct. Reporter 256..16, 25

Public Service Railway Company v. Board of Public Utility Commissioners, 96 N. J. Law 54..... 17, 34

Quaker City Cab Company v. Pennsylvania, 277 U. S. 389 ..... 22, 68

Robertson v. Frank Brothers Company, 132 U. S. 17....20, 64

Scott v. Eagle Fire Company, 7 Paige (N. Y.) 198..... 17, 37

Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433..... 21, 67

State *ex rel* Hyde, Superintendent v. Westhues, 316 Mo. 457, 290 S. W. 443 .....18, 19, 23, 42, 45, 50, 55, 56, 79, 80

Stone v. Bank of Commerce, 174 U. S. 412..... 18, 49

Sun Insurance Office, appellant v. Clark, respondent (appeal cases) Law Reports 1912, page 443..... 17, 35, 37

Swift & Company v. Hocking Valley Railway Company, 243 U. S. 281..... 19, 53

Swift & Company v. U. S., 111 U. S. 22 ..... 20, 63

Terral v. Burke Construction, 257 U. S. 529, 533..... 21, 66

Tyson Brothers United Theatre Ticket Office. Inc. v. Banton, 271 U. S. 418..... 22, 69

Union Dry Goods Company v. Georgia Public Service Corporation, 248 U. S. 372, 9 A. L. R. 1420..... 21, 67

PAGE

Union Pacific Railroad Company v. Public Service Commission of Missouri, 248 U. S. 67 ..... 20, 62

United States v. Cohan Grocery Company, 255 U. S. 81 ..... 22, 74

Welsh v. Maryland Insurance Company, 47 Oklahoma, 933, L. R. A. 1915-E, 708 ..... 22, 74

Table of Statutes.

Revised Statutes of Missouri 1919, Section 6283 (Under which powers of Superintendent are asserted) 3, 57

Revised Statutes of Missouri 1919, Section 6284 (Providing for statutory review) first enacted laws of Mo. 1915 p. 313 ..... 5, 57

Revised Statutes of Missouri 1909, Section 7013, Insurance Laws of Missouri 1927, Section 6222 (Statute requiring unearned reserve) 33

Revised Statutes of Missouri 1909, Section 7064 34

U. S. Revenue Act, Nov. 23, 1921, Section 246 (Income Tax Law) latest enactment U. S. Rev. Act May 29, 1928, Ch. 852, Sec. 206 31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 104.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, *Appellant,* vs. **JOSEPH B. THOMPSON, Superintendent of Insurance Department of the State of Missouri and STRATTON SHARTEL, Attorney General of the State of Missouri,** *Appellee.*	Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

There is no official report of the opinion delivered in the court below. Opinion was rendered on April 13, 1929. Applications for interlocutory injunction were contemporaneously heard in 155 cases of which this is one. Injunctions were granted in forty-one cases and denied as respects 114 applicants of whom appellant was one. The 155 suits were all of like tenor, praying identical relief against the same defendants. Hearing was before a statutory three judge court.

Appellant has complied with Paragraph 1 of Rule 12, respecting statement of grounds on which the jurisdiction of the court is invoked, which will not be here repeated.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court of the United States for the Western Division of the Western District of Missouri, pursuant to a hearing before a statutory three judge court. The order appealed from denies the application of appellant for an interlocutory injunction. Such application for an interlocutory injunction was in writing (R. 46) and prayed for an interlocutory injunction to enjoin the enforcement of an insurance *rate order* made by the superintendent of insurance of Missouri, on *October 9, 1922.* Such order was directed to appellant and all other stock fire insurance companies doing business in Missouri and was served upon the rating organization of which appellant and other fire insurance companies were members. The rate order of October 9, 1922, exclusive of its formal parts, is as follows:

> "You and each of you are hereby notified that I have this day ordered a reduction of ten per cent in the rates now charged by the aforesaid companies on fire, lightning, hail and windstorm insurance business written in the State of Missouri, which, reduction, in my judgment, will still leave said companies a reasonable profit after giving proper and reasonable consideration to the conflagration liability, both within and without the state.
>
> The aforesaid reduction order shall take effect and be in operation on and after the 15th day of November, 1922, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not, within thirty days from this order of reduction submit a class or classes which meets the approval of the Superintendent of Insurance, the Superintendent will designate the class or classes to which the reduction shall apply." (R. 5.)

The power to make such rate order was asserted to exist under Section 6283 of the Revised Statutes of Missouri, 1919 (R. 4), which statute is as follows:

> "Sec. 6283. Superintendent to investigate the reasonableness of rates—authority to order reductions. The

Superintendent of Insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. Any reduction ordered by the Superintendent of Insurance shall be applied, subject to his approval: Provided, that the Superintendent of Insurance shall designate the class or classes to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. In determining the question of rates and profits in accordance with this article, the Superintendent of Insurance shall give proper and reasonable consideration to the conflagration liability, both within and without the state."

The application for an interlocutory injunction was pursuant to provisions of the Federal Statutes and was served upon the governor and attorney general of the State of Missouri. (R. 48.) It was based upon and presented upon facts appearing in the verified bill of complaint (R. 1-37) and amendments thereto (R. 44-46) and supporting affidavits filed (R. 67-92). No evidence was offered in contradiction by the appellees who presented only two verified motions to dismiss the suit or stay proceedings, the motion to dismiss the suit alleging *res judicata* and estoppel by reason of a certain stipulation hereinafter more particularly noted. (R. 49-57.)

The decision of the court below, is to the effect that an injunction would issue to the appellant, except for an asserted estoppel arising out of the stipulation in question. Such stipulation appears in the record and is set forth in full in the opinion of the court below (R. 101-103), and is set forth at a later point in this statement.

Jurisdiction existed in the Federal Court below, by virtue of allegations of diversity of citizenship (R. 3) and the existence of the jurisdictional amount in controversy (R. 2). The bill proceeds further upon the ground of confiscation and alleges infringement of rights of appellant in its Federal Constitutional rights under the due process and equal protection clauses of the 14th Amendment. The facts appearing in the verified bill and amendments thereto respecting which there is no dispute in the record, are briefly as follows:

Appellant is a stock fire insurance company, a citizen of the State of Connecticut and appellees are citizens and residents of the State of Missouri, and are respectively the superintendent of the insurance department of Missouri and the attorney general of that state. (R. 1, 2.) Appellant has for years been licensed to do business in the State of Missouri and has substantial property there consisting of an established business, good will, agency plant, maps, surveys and rating records of a value greater than $3,000 (R. 3, 4). While appellant was so engaged in the conduct of its established business, the former incumbent of the office of the superintendent of insurance on October 9, 1922, made an order directing all stock fire insurance companies in Missouri, including appellant, to reduce their rates ten per cent on fire, lightning, hail and windstorm insurance. (R. 4, 5.) The statute requires that if the companies do not designate the classes to which any rate order shall apply, then designation of classes shall be made by the superintendent. The superintendent on February 1, 1928, designated the classes to which the reduction should apply. (R. 44-46.) (What is contemplated by the term "classes" as used in the statute is disclosed at R. 90.) On November 10, 1922, 157 companies, of whom appellant was one, filed a joint review proceeding, pursuant to the statutes of the state, to review the rate order in question, which review proceeding was pursuant to provisions of Missouri statutes, namely:

Section 6284 R. S. Mo. 1919, which is as follows:

"Sec. 6284. Order of superintendent reviewable by court action. The orders and directions of the superintendent of insurance, together with his findings or determinations of facts upon which such order or determination is founded, shall be reviewable by a proper action in the courts, and upon such review the entire matter shall be treated and determined *de novo*, but the burden of proof as to the unreasonableness or the injustice of any order made by the superintendent of insurance shall rest upon the party or company appealing from any such order. During the pendency of such action or review each insurance company or other insurer shall not charge any rate or premium in excess of that fixed by the superintendent of insurance. (Laws 1915, p. 313.)"

Under such joint review proceeding the rate order was held confiscatory, but on appeal, the Missouri Supreme Court reversed the decree of the Circuit Court and upheld the reduction order as against such joint attack. (*Aetna Insurance Co.* v. *Hyde*, 315 Missouri 113.) (See R. 5.) Certiorari was brought to the Supreme Court of the United States, which granted certiorari and later dismissed the writ on the ground that the issue of confiscation respecting individual companies could not arise in such joint review proceeding; that if confiscation existed, it was the subject of an independent suit by individual companies. (*Aetna Insurance Company, et al.* v. *Hyde, et al.*, 275 U. S. 440.)

Appellant, in the instant suit (filed by it individually, after the decision of the Supreme Court of the United States), asserts that the statute as applied to it by the rate order is confiscatory, and that its constitutional rights existing under the due process clause of the 14th Amendment of the Federal Constitution are violated. (R. 8-10.) The fact is alleged in the verified bill that during the five years preceding the date of the rate order (five years being the test period fixed by statute), namely the years 1917 to 1921, appellant sustained

a loss upon the conduct of its business of insurance in Missouri. (R. 11.)

That its income (earned premiums) was	$2,024,766.00
Its outgo (incurred insurance losses and expenses) was	2,330,251.00
And that its outgo exceeded its income by the sum of	$ 305,485.00

In the six years succeeding the date of the rate order, namely 1922 to 1927 inclusive, it likewise sustained a loss (R. 11, 46), namely:

Income (earned premiums)	$3,501,540.00
Outgo (incurred losses and expenses)	3,702,496.00
Loss (excess of outgo over income)	$ 200,956.00

This excess of outgo over income was suffered at going premium rates and would have been increased had the reduction been in force. During all of the period in question, the business of appellant was prudently, soundly and economically conducted. (R. 10.) The insurance companies doing business in the State of Missouri during that period, likewise suffered an aggregate loss in the conduct of their business, outgo being more than $7,000,000 in excess of income during the period of 1917 to 1921 inclusive. (R. 6.) During the period since the date of the rate order the aggregate experience of all companies in the state discloses their outgo exceeded income by $11,233,102 upon $139,972,636 of premiums. (R. 91, 92.)

The bill alleges that in the light of the individual experience of the appellant and considering the experience of other properly conducted insurance companies, the order which would further decrease income, is confiscatory and in violation of the 14th Amendment (R. 8-10.) The grounds on which the claim of confiscation rests are shown in great detail in the verified bill of complaint (R. 11-19) and in the supporting affidavits (R. 66, 76, 83, 91).

The bill challenges the constitutionality of the rating statute and of the rate order purporting to be made under it as violative of the 14th Amendment of the Constitution of the United States in the following, among other particulars:

(*a*) The rating statute of Missouri as applied by the Superintendent in his rate order and justified by the Supreme Court of Missouri, was based upon a consideration of aggregate experience of all companies doing business in the state (R. 5-11), without taking into consideration the individual experience of the plaintiff. Such basis employed was that of premiums *received* as income and losses and expenses *paid* as outgo. The premiums received by all companies during the period was $83,502,181 and losses and expenses paid were $80,161,057. (R. 5-11.) The reduction of ten per cent ordered would completely destroy the small balance of profit existing. The proper basis for measurement of profit or loss is alleged to be that of premiums earned as income and losses and expenses incurred as outgo. Experience during the test period, discloses a loss in the aggregate of all companies of over $7,000,000 in excess of income during the test period, which would be increased by the amount of the reduction. (R. 6.)

[The court below, while criticizing the earned and incurred basis, urged by appellant, did not decide the case upon that ground, but granted interlocutory injunctions (R. 127, 128) to forty-one companies which made application at the same time as appellant did, these companies setting up their experience on the earned and incurred basis. The ground upon which the court below granted interlocutory injunction to some companies and denied it to others, was solely upon the basis that appellant was a party to the stipulation already mentioned. (R. 59.)]

(*b*) The rating statute as applied by the superintendent and justified by the courts of Missouri, took into account $2,301,132 of interest on unearned premiums as income. (R.

13, 14.) The rejection of this item from income is effective to destroy any balance of profit during the test period and coupled with the reduction, would compel the plaintiff to do business without any profit whatever. The court below sustained the contention of the appellant that the basis was fundamentally erroneous and that such item was not a proper element of income (R. 123).

(*c*) The court below also sustained the contention of the plaintiff that the superintendent erroneously eliminated from expenses $2,496,715 of commissions paid to St. Louis agents upon a scale higher than was paid in the remainder of the state. (R. 114-118.) The rejection of such proper outgo from the account, was asserted to be the adoption of an unsound basis, the effect of which was confiscatory upon the plaintiff. (R. 114-118.)

(*c*) The experience of the plaintiff, which had an established, soundly conducted and properly managed business (R. 10) as set forth in the bill, discloses an outgo in excess of its income during the five years preceding the rate order. (R. 11.) Had the rate order been in force during such test period, its outgo would have been approximately 125 per cent of its income. Its outgo has also exceeded its income since the date of the rate order, even without application of the rate reduction order. (R. 11.) The superintendent of insurance, by warrant of the statute, as construed and applied by the courts of Missouri, has taken into account elements which are arbitrary and capricious. (So found by the court below.) (R. 114-118-123.) By compliance with the rate order appellant will suffer a day to day loss of $50 per day, which will be irreparable and cannot be recouped. (R. 31.)

Other grounds of attack upon the statute and upon the rate order pursuant to it, as made in the bill of complaint, are that:

(*a*) The business of appellant is a private business and the regulations undertaken invade appellant's right of contract and take its property without due process of law. (R. 12.)

(*b*) Such statute is unconstitutional and as applied to appellant denies equal protection, in that it is applied only to stock fire insurance companies and exempts other insurers similarly situated and doing a like business. (R. 16-17, 18-19.)

(*c*) The statute authorizes proceeding to a reduction of appellant's rates without any provision for notice or hearing to appellant, which is a denial of due process of law. (R. 18.)

(*d*) The statute as construed and applied, authorizes adoption of a basis of premiums *received,* less losses and expenses *paid,* instead of premiums earned as income and losses and expenses incurred as outgo, and that the basis so warranted and employed is unreasonable, fundamentally erroneous and confiscatory and amounts to a denial of due process of law. (R. 13.)

(*e*) The statute as so construed and applied authorizes the taking into account of investment earnings styled "interest on unearned premiums"; that this is a fundamentally erroneous and confiscatory basis, and that predicating a reduction of appellant's rates on such basis is a denial of the due process of law. (R. 14, 15.)

(*f*) A like confiscatory effect of the statute, as construed and applied, exists by the elimination from expense of commissions in fact paid and properly and justifiably paid to agents of the appellant, and that such action is a denial of the due process of law. (R. 15, 16.)

The irreparable nature of the injury to appellant, if injunction be not granted, appears *in extenso* in the verified bill and discloses that the effect of compelling appellant to do business under the statute and rate order in question is to cause it a day by day confiscatory loss and force it to the alternative of abandoning an established business in Missouri, or, if it continue to do business and refuse to comply with the unconstitutional rate order under the unconstitutional statute aforesaid, to subject it to ruinous criminal proceeding, fines and penalties and that if it do business on the

reduced basis, it will suffer a day by day confiscation which will be irrecoverable. (R. 30-33.)

The court below sustained the position of appellant in two particulars, viz.:

(1) The superintendent adopted an arbitrary and unsound method in rejecting excess commissions from expense. (R. 117.)

(2) He adopted an unsound basis in the inclusion of interest on unearned premium in income. (R. 123.)

The court below declined to enter into consideration of invasion of constitutional rights or confiscation because it held that appellant was estopped to present such issues in a court of equity.

The stipulation which the court below holds to operate as an estoppel was made on February 14, 1922 (eight months before the making of the rate order in question in this suit). As the stipulation is given controlling effect by the court below, we set it out in full in this statement. (R. 85.) It is as follows:

"IN THE

CIRCUIT COURT OF COLE COUNTY, MISSOURI,
November Term 1921.

Aetna Insurance Company, *et al.*,
Plaintiffs,

vs.

Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri,
Defendant.

STIPULATION.

Whereas, Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, has this day withdrawn and revoked the order published and declared by him on the 5th day of January, 1922, effective February 15, 1922, reduc-

ing the rates of insurance charged by all stock fire insurance companies doing business in the State of Missouri, on all fire, lightning, hail and windstorm business written by them in this State; now, therefore, it is hereby stipulated by and between the parties hereto that the following order may be entered of record in this cause:

1. The above entitled cause is hereby dismissed, and the restraining order heretofore entered therein is hereby dissolved, and all liability under the bond given pursuant to the conditions of said restraining order is hereby satisfied and discharged, and the surety on said bond is hereby released.

2. It is further stipulated and agreed that the said Superintendent of the Insurance Department, defendant herein, may, not earlier than March 15, 1922, call a hearing to investigate the necessary for a reduction in rates charged by the stock fire insurance companies doing a fire, lightning, hail and windstorm insurance business in this State; that at such hearing, if and when called, the stock fire insurance companies will appear by counsel and will produce such evidence as may be required by the Insurance Department, or they may see fit to present, bearing upon such question; that at such hearing the experience of said companies in the State of Missouri for the year 1921 shall be offered in evidence and considered by the Superintendent of the Insurance Department, together with such other evidence as may be offered in reaching his determination; that at the conclusion of such hearing the Superintendent of the Insurance Department will make findings of fact and announce his determination thereon, and that he shall, in writing, find all essential, material and competent matters of fact disclosed by the evidence; that he shall make the following findings:

(*a*) What was the profit of said stock fire insurance companies during the five years preceding said investigation, including the year 1921;

(*b*) What is a reasonable profit on the business written in this state;

(*c*) What per cent of premium received is allowed for the conflagration hazard;

(*d*) What is the basis upon which earnings in Missouri should be determined and ascertained;

(*e*) What is the ratio of expenses incurred to premiums earned in this State during such period;

(*f*) What is the ratio of losses incurred to premiums earned in this State during said period;

(*g*) What is the total amount of earned premiums during said period.

3. That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial *de novo* in the Circuit Court of Cole County, Missouri.

4. That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

5. That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919,

shall not be raised, nor shall the legality of the hearing above provided for be questioned.

BATES, HICKS AND FOLONIE,
SEYMOUR EDGERTON,
JOHN S. LEAHY,
Attorneys for the plaintiffs.

JESSE W. BARRETT,
Attorney-General.

MERRILL E. OTIS,
Assistant Attorney-General.
—Attorneys for the Defendant."

The statutory court below came to the conclusion that the foregoing stipulation was creative of an estoppel, and, speaking of plaintiff and other insurance companies in an identical position, says:

> "They should comply with the stipulation and make the refunds required thereby before asking any equitable relief. When that status has been fully established they will be in position to proceed to have their rates determined and protected, and not before." (R. 108.)

The court below, in its opinion, further says:

> "It is argued that to require this repayment (of all excess collected from November 15th, 1922, to date as a condition of applying for interlocutory injunction) is confiscatory because 'it would be impossible ever to recover back the repayments thus made to policyholders'." (R. 108.) (Explanatory words in parenthsis inserted by us.)

Respecting such contention, the Court says:

> "It is probable that such recovery would be impossible, or at any rate highly improbable. But such result is no reason for granting the injunctions." (R. 109.)

The Court holds that the rate order was effective on February 1, 1928, as to companies not parties to the stipulation,

but as to the plaintiff, and other parties to the stipulation, it is effective as of November 15, 1922. The Court says:

> "They (appellant and other companies in like situation) are estopped to deny that the order was not in effect as to them from the effective date (November 15, 1922), provided in the order itself.
>
> The plaintiffs herein which were not parties to the stipulation are in a better position. They can require an absolute compliance with the statute; as to them the order did not become effective until February 1, 1928." (R. 129, 130.) (Explanatory words in first parenthesis inserted by us.)

Although the rate order here in question was made October 9, 1922, the companies did not at any time submit any class or classes (for meaning of term "classes" see R. 90) to which the rate order should apply, as provided by statute, and the superintendent made no designation of classes to which the rate order should apply until February 1, 1928. On that date he made a written designation of classes, reciting the rate order and providing:

> "I hereby require that on February 1, 1928 this reduction be applied to the existing fire, lightning, hail or windstorm rates for all classifications of such risks," etc., (R. 89).

It is the contention of appellant that:

(*a*) Denial of injunction prayed for is an abuse of discretion.

(*b*) The stipulation is no bar to equitable relief, because plaintiff did not violate the stipulation.

(*c*) The stipulation made no provision for repaying excess premiums, as the Court rules must be done.

(*d*) The stipulation was abandoned by the superintendent, who did not make findings as required by it and, therefore, declined to be bound by it but chose rather to follow the statute.

SPECIFICATION OF ERRORS.

1. The United States District Court for the Western Division of the Western District of Missouri erred in overruling and denying the application for interlocutory injunction.

2. The Court erred and abused its discretion in imposing as a condition precedent to considering such application that appellant should refund ten per cent collected on premiums upon fire, lightning, hail and windstorm insurance since November 15, 1922; whereas there was no duty on appellant to make restitution in any amount under any circumstances prior to February 1, 1928.

3. The Court erred in determining the facts, particularly those relating to the stipulation and compliance or noncompliance with it, whereas such matters should more properly have been reserved to final hearing of the case. The Court was not warranted in deciding them against appellant at this stage.

4. It being conclusively shown that irreparable injury would result if interlocutory injunction were not granted, and that the balance of injury as between the parties was such that great harm would be done by denial of the injunction, whereas the rights of the opposing parties could be secured if it were granted, the Court erred and abused its discretion in denying the interlocutory injunction.

5. The Court erred in applying to appellant the doctrine of "unclean hands," because there was nothing before the Court reasonably warranting a conclusion that the hands of appellant were unclean.

6. The Court erred in holding that Section 6283, Revised Statutes of Missouri, 1919, is not in violation of the due process

and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

7. The Court erred in holding that the rate reduction order of October 9, 1922, is not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

8. The Court erred in approving the basis of premiums received less losses and expenses paid as a measure of profit, whereas earned premiums and incurred losses and expenses form the only reasonable and appropriate basis for insurance profit calculation.

9. The Court erred in not enjoining the rate order, which was arbitrary and unreasonable not only as to the basis of premiums, losses and expenses adopted, but also because of taking into account investment earnings in fixing an underwriting rate.

(*e*) The stipulation applied only to proceedings in the statutory review proceeding in the state court and not to the present suit.

(*f*) The stipulation may not be given the effect which the court below gave it or be applied to plaintiff without violating the constitutional rights of appellant.

(*g*) The condition imposed for return of ten per cent of all premiums collected from November 15, 1922 to date as a condition of being heard, is without warrant.

Appellant relies upon each of the assignment of errors which it has filed herein, and specifies each of them as a ground for reversal of the cause.

SUMMARY OF ARGUMENT.

I.

The application of the Missouri Insurance Rate Regulation Statute to plaintiff, through the medium of the rate order, operates as a denial of due process of law in violation of the rights of appellant under the Fourteenth Amendment of the Constitution of the United States. The court below abused its discretion in denying appellants' application for an interlocutory injunction.

(*a*) The prescribed rate, permitting no return whatever to the operator of the business, is confiscatory.

Bluefield Water Works and Improvement Company v. *Public Service Commission,* 262 U. S. 679, 690.

(*b*) The questions presented are grave, and irreparable injury will result in the absence of an interlocutory injunction. Denial therefore, is an abuse of discretion.

Ohio Oil Company v. *Conway,* 49 Supreme Court Reporter, 256.

II.

A sound insurance profit and loss calculation can be made only upon the basis of earned premiums as income and incurred losses and expenses as outgo. It is unsound to state a supposed profit on the "paid" basis. Such method is arbitrary and fundamentally unsound.

(*a*) The statutes of Missouri require a setting up of unearned premiums as a liability and to maintain it as a re-

serve. It is arbitrary and confiscatory to so require, but prevent compliance, by terms of a rate order withholding the income necessary to create the reserve.

Public Service Railway Company v. *Board of Public Utility Commissioners*, 96 N. J. Law 54.

(*b*) Arbitrary and unreasonable exercise of power operates to nullify a rate order.

Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541.

(*c*) Decisions of courts of the highest standing sustain the earned and incurred basis of calculation.

Sun Insurance Office, appellant v. *Clark, respondent* (Appeal cases), Law Reports 1912, p. 443.

Bullion v. *Aetna Insurance Company*, 151 Ark. 519, 237 S. W. Rep. 716.

Insurance Company v. *Page & Richardson*, 17 B. Monroe (Ky.) 412.

Kenton Insurance v. *Covington*, 86 Ky. 213.

Hope Mutual Life Insurance Company v. *Perkins*, 4 Rob. (N. Y.) 182.

Scott v. *Eagle Fire Company*, 7 Paige (N. Y.) 198.

2 Cook on Corporations, 7th Ed., Sec. 546, p. 1609.

6 Fletcher Ency. on Corporations, p. 6104.

III.

The superintendent of insurance in making his rate order did not make the findings stipulated to be made, nor did he base his order on the same, as was stipulated should be done. By such action appellant was relieved from any obligations arising out of the stipulation.

See Argument.

IV.

Appellant is not precluded from its action, nor debarred of interlocutory relief because of waiver or estoppel.

(*a*) Appellant was free, after promulgation of the rate order and prior to the designation of classes, to charge pre-existing rates, nor was its action in doing so unlawful or in violation of any duty it owed the state or the superintendent.

State ex rel. Hyde, Superintendent v. *Westhues*, 316 Mo. 457; 290 S. W. 443.

V.

The court below was in error in its construction of the stipulation. Appellant did not stipulate or agree to repay money to policy holders. The "clean hands" doctrine is not soundly applied to bar relief.

(*a*) The stipulation was not applicable to the present proceeding, but only to the review proceeding. It conferred no new powers on the superintendent and gave no new rights to appellant.

State ex rel. Hyde v. *Westhues*, 316 Mo. 457; 290 S. W. 443.

(*b*) The court below erroneously construed the stipulation as applying to the present suit, which was not *in esse* and not necessarily in contemplation. There was no authority in counsel for the state or the companies to give it the scope which the court below gives it, nor was it within their intention so to do.

Stone v. *Bank of Commerce*, 174 U. S. 412.

(*c*) The attorney general had no power to bind the superintendent to any action contravening the statute and the

superintendent had no powers except those delegated by statute. The court below was in error in assuming that the stipulation was designed to fix the status of insurance rates.

State of Missouri ex rel. Hyde v. *Westhues,* 316 Missouri 457; 290 S. W. 443.

(*d*) The stipulation, that specified bonds would be furnished under directions of the Court in a proceeding not yet existing, could not operate as an estoppel because the duty of the Court was the same, whether the parties stipulated or not, and its action would be pursuant to its inherent powers and not because of the stipulation of the parties.

Swift & Company v. *Hocking Valley Railway Company,* 243 U. S. 281.

(*e*) The stipulation was designed to apply to procedure in the statutory review proceedings only and cannot fairly be otherwise construed. To extend it to other suits not even in contemplation at the time is a violation of the rule that such waivers of constitutional rights should be strictly construed in favor of the preservation of the right.

Burnham v. *North Chicago Street Railway Company,* 88 Fed. Rep. 627.

VI.

The stipulation did not fix the status of insurance rates. The powers and duties of the superintendent were fixed by statute. He could not bargain respecting them. The stipulation therefore was lacking in mutuality and had no binding effect.

State ex rel. Hyde v. *Westhues,* 316 Mo. 457; 290 S. W. 443.

VII.

If the stipulation be construed as a waiver in advance of infringement of guarantees of the Fourteenth Amendment, it is void. Appellant was under duress.

(*a*) A rate order made without notice or hearing is a nullity.

Co. v. *Armour Fertilizer Works*, 237 U. S. 412.

(*b*) A stipulation made with a state official to avoid drastic penalties to escape the results of an unconstitutional rate order is an act under duress and cannot create an estoppel.

Co. v. *Armour Fertilizer Works*, 237 U. S. 412.

Atchison, Topeka & Santa Fe Railway Company v. *O'Connor*, 223 U. S. 280.

Union Pacific Railway Company v. *Public Service Commission of Missouri*, 248 U. S. 67.

Swift & Company v. *U. S.*, 111 U. S. 22.

Robertson v. *Frank Brothers Company*, 132 U. S. 17.

Garr Scott & Co. v. *Shannon*, 223 U. S. 468.

VIII.

A stipulation was made by attorneys representing all stock insurance companies en masse. It did not and could not bind the several insurance companies to forego assertion of individual infringement of constitutional right thereafter accruing.

(*a*) Confiscation may be asserted when it exists, regardless of previous actions or agreements of the party to whom confiscatory action is thereafter applied.

Banton v. *Bell Line Railroad*, 236 U. S. 414.

(*b*) An agreement in advance that a party will in the future refrain from asserting his constitutional rights if invaded, is a nullity.

Insurance Company v. *Morse*, 20 Wallace 445.

Barron v. *Burnside*, 121 U. S. 186.

Doyle v. *Continental Insurance Company*, 94 U. S. 535 (dissenting opinion subsequently adopted as law in *Terral* v. *Burke Construction Company*, 257 U. S. 529, 533).

Southern Pacific Company v. *Interstate Commerce Commission*, 219 U. S. 433.

McFarland v. *American Sugar Company*, 241 U. S. 79, 85.

Union Dry Goods Company v. *Georgia Public Service Corporation*, 248 U. S. 372; 9 A. L. R. 1420.

IX.

The Missouri Rating Statute violates the equal protection clause of the Fourteenth Amendment, in that it regulates rates of stock fire insurance companies and does not apply to other insurers doing an identical business.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494.

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389.

X.

The rate fixing here under review is an unconstitutional invasion of right. If it may be justified by the ruling in German Alliance Insurance Company v. Lewis, 273 U. S. 389, then the decision in that case should be modified.

Tyson & Brothers United Theatre Ticket Offices, Inc. v. *Banton*, 271 U. S. 418.

Doyle v. *Continental Insurance Company*, 94 U. S. 534 (minority opinion).

(*a*) The statute as construed and applied to appellant trenches upon its rights and is beyond appropriate exercise of police power.

Welsh v. *Maryland Insurance Company*, 47 Okla. 933; L. R. A. 1915-E, 708.

Northwestern National Insurance Company v. *Fishback*, 130 Wash. 490.

United States v. *Cohan Grocery Company*, 255 U. S. 81.

XI.

The questions here involved are of such importance they should not be determined adversely to apppellant on interlocutory hearing.

See Argument.

(*a*) The court below erred in assuming that the superintendent was a rate maker, which would extend his powers beyond legitimate police powers. In fact the statute did not, when properly construed, give him rate making powers.

State ex rel. Hyde v. *Westhues*, 316 Mo. 457.

XII.

The condition imposed for consideration of the application for injunction,—namely return of 10% of all premiums collected from November 15th, 1922, to date,—is arbitrary and an abuse of discretion.

Rev. Stat. Mo., 1919, Sec. 6283.

See Argument.

ARGUMENT.

I.

The application of the Missouri Insurance Rate Regulation Statute to plaintiff, through the medium of the rate order, operates as a denial of due process of law in violation of the rights of appellant under the Fourteenth Amendment of the Constitution of the United States. The court below abused its discretion in denying appellant's application for an interlocutory injunction.

The bill in chancery in this case discloses that the experience of the appellant for five years before the date of the rate order in question, which is the statutory experience term and a reasonable test period, was as follows (R. 11):

Income (earned premiums)	$2,024,766
Outgo (incurred losses and expenses)	$2,330,251
Excess of outgo over income	$ 305,485

Had the reduction in question been applied during such period, the excess of outgo above income would have been almost double.

During the six years since the date of the rate order, the experience of the appellant in Missouri (without applying the reduction) has been as follows (R. 11, 46):

Income (earned premiums)	$3,501,540
Outgo (incurred losses and expenses)	$3,702,496
Excess of outgo above income	$ 200,956

It is expressly alleged that the appellant has an established business and that it is an economically, soundly man-

aged and prudently conducted insurance company. (R. 10.) The experience of the appellant is not isolated, but the experience of other insurance companies similarly situated in the State of Missouri resulted in a loss on their part during the five-year test period before the date of the rate order,—outgo of approximately 110 per cent of income. (R. 6.) Their experience during the six years following the date of the rate order has been productive of an outgo of about 109 per cent of income. (R. 91, 92.)

The court below expressly found that the defendants offered no evidence whatever to refute the claim of confiscation. (R. 127.)

The superintendent of insurance directed a rate reduction to be applied to appellant which is a company properly conducting its business and conducting it at a loss, (such loss not being an exceptional or peculiar situation but a situation which exists likewise respecting other companies doing like business in Missouri). An order reducing rates under such circumstances is confiscatory and an unconstitutional invasion of the rights of appellant under the due process clause of the Fourteenth Amendment of the Federal Constitution.

A prescribed rate which permits no return whatever to the operator of the business is confiscatory.

Bluefield Water Works and Improvement Co. v. *Public Service Commission,* 262 U. S. 679, 690.

The proof on the part of appellant was clear. The court below found that if appellant should refrain from collecting pre-existing rates and should make a reduction of ten per cent, recovery thereof from policy holders thereafter would be impracticable, if not impossible, and "the expense thereof is prohibitive when the amount of recovery is considered." (R. 128.)

The case falls clearly within the rules declared in *Ohio Oil Company* v. *Conway,* (not officially reported) 49 S. C. Rep. 256, where it is said:

> "Where irreparable injury will result and the opposing party may be indemnified by a bond, and the questions presented by the application are grave, an interlocutory injunction should issue, and its denial is an abuse of discretion."

The court below, while conceding the adequacy of the case of the appellant and the showing made by it as requiring an interlocutory injunction, except for existence of the stipulation in question, (which will be discussed in later sections of this brief), did criticize the basis of *earned* premiums as income and *incurred* losses and expenses as outgo, expressing a preference by the Court for the basis of premiums *paid* and losses and expenses *paid.* That this was not controlling with the Court, however, is indicated by the fact that the court below granted an interlocutory injunction to forty-one companies not parties to the stipulation, who made a contemporaneous application for interlocutory injunction upon bills identical in their nature. (R. 128.)

Phases of the argument dealing with the propriety of earned premium basis and effect of the stipulation, presenting readily separable points of argument, are considered under divisions of the argument *postea.*

The statute and the rate order purporting to be made pursuant to it are unconstitutional infringements of right of the appellant in so many particulars that it is impractical to argue them all at length in this brief. It is our view that on interlocutory hearing, such as the present, the Court should not be burdened with the detail of them, and that it should serve every purpose to call them to the Court's attention, so that the Court may be advised that they are serious matters worthy of preservation to a final hearing,

by granting of an interlocutory injunction to preserve the existing status until they can be determined upon a fuller hearing.

The constitutional questions involved, and which we urge are ample to warrant the granting of an interlocutory injunction and reserving such questions for final determination upon ultimate decision of the case, are:

(*a*) The statute of Missouri (Rev. St. Mo. 1919, sec. 6283) makes no provision for any notice or hearing to appellant and other insurance companies before the making of a rate reduction order. The court below held:

> "We need not inquire whether such notice and hearing is a legal requirement, because neither the wording nor any proceeding thereunder prevents such notice and hearing, and both were accorded in this instance."

The granting of notice and hearing as a matter of grace and because of private agreement that it shall be had, such as was provided in the stipulation in question, does not remedy the defect in the statute. The view which the court below expressed as above is squarely contrary to the holding of this Court in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424, 425. The point is specifically raised by the sworn bill of complaint. (R. 18.)

(*b*) The decision of the court below in effect holds that the insurance superintendent is the manager of the business of appellant and, if its ruling be correct, takes the management of the business out of the hands of the officers of appellant. It is a regulation not warranted by the police power, which point is fully set up in the bill of complaint (R. 12) and presented more fully in Point X of this brief.

(*c*) The statute, by its terms, is made to apply to stock fire insurance companies, and exempts other insurers similarly situated and doing a like business. This point is expressly made in the bill of complaint (R. 16-19), and is further presented under Point IX of this brief.

(*d*) The statute as construed and applied authorizes the adoption of premiums received basis, thereby taking unearned premium into account as an element of income in fixing a just rate. This is fully presented in the bill of complaint (R. 13) and elaborated in the affidavits filed on the hearing. (R. 66.) The effect of such action is to deny appellant income wherewith to set up a reserve for unearned premiums, altho by the statutes of Missouri (Rev. St. Mo. 1909, Sec. 7013; Ins. Laws Mo. (1927) Sec. 6222) appellant is required to set up a reserve which it is prohibited from using to pay dividends or otherwise employ the funds for corporate purposes. R. S. Mo. 1909, Sec. 7064; Ins. Laws Mo. (1927) Sec. 6333.

(*e*) The statute as applied by the rate order eliminates from expense commissions in fact paid and which the court below holds were properly paid and subject to be taken into account as justifiable outgo. The facts respecting this matter are fully set up in this bill. (R. 15, 16.) The court below, while sustaining the position of the appellant that such arbitrary and confiscatory method was employed by the superintendent, nevertheless denies relief against such confiscatory action.

(*f*) It is alleged in the bill and admitted herein that the superintendent included interest on investments as an item of income and thereby employed income of appellant derived from a distinct department of its business as income applicable to its underwriting department. The matter is fully set forth in the bill of complaint. (R. 6, 13, 26-28.) The position of the appellant was sustained by the court below, in that the court below holds that such item was improperly taken into account (R. 123), nevertheless interlocutory injunction is denied to the appellant.

(*g*) The bill alleges, and it is admitted, that the superintendent in making his rate order gave no consideration to

the individual experience of the appellant (R. 5-11), and that upon the experience of the appellant its business had been conducted over a long period of years at an actual loss, nevertheless it is subjected to a further reduction of income. (R. 5-11.) The established nature of the business of appellant (R. 3), the day by day confiscation resulting from the application of the statute through the medium of the rate order (R. 33), and the fact that the rights of policy holders and others entitled to protection could be adequately safeguarded by requirement of bonds and that an irreparable injury would result to appellant if application for interlocutory injunction be denied are all uncontradicted facts in the record.

(*h*) The court below imposed a condition upon even considering application for interlocutory injunction, that refund down to the rate prescribed by the rate order be made from November 15, 1922 forward to date (R. 108, 109, 129); whereas the rate order was not effective so as to require any reduction (even if its validity and constitutionality be conceded) until February 1, 1928. This point will be found treated under Point XII of this brief.

II.

A sound insurance profit and loss calculation can be made only upon the basis of earned premiums as income and incurred losses and expenses as outgo. It is unsound to state a supposed profit on the "paid" basis. Such method is arbitrary and fundamentally unsound.

It is the position of the appellant that the basis presented in the bill, that of earned premiums as income and incurred losses and expenses as outgo, is sound. If the question were one of serious doubt, the Court should, nevertheless, grant an interlocutory injunction and await the evidence to be

presented upon the hearing of the case in coming to appropriate conclusions.

It may well be that evidence of accountants and others skilled in giving the Court reasons for adoption of one basis rather than another may prove of controlling aid.

The plaintiff's case respecting income and outgo was set up in the bill of complaint on the basis of *earned* premiums as income and *incurred* losses and expenses as outgo. The court below in its opinion, indicated dissent from this basis and inclination to favor the basis of premiums *received* as income, and losses and expenses *paid* as outgo. In this view the Court was in error, but we shall not argue the matter at length, as the decision below was not based upon such view of the Court, the Court holding that as to companies not parties to the stipulation, it would grant an interlocutory injunction, notwithstanding the basis was one which the Court was inclined to disapprove. This action of the Court was doubtless upon the premises that the matter was one more properly to be determined definitely upon final hearing to which time the Court reserved that question. It is the fair intent of the opinion that (irreparable damage resulting if an injunction be not issued and the matter being one of doubt whether one basis or the other was proper for adoption), the Court upon consideration of the balance of injury determined (except for stipulation) to grant an interlocutory injunction, reserving the question of the proper basis of profit calculation for further consideration in a final decree. (R. 127.) The record discloses an exhaustive affidavit of Charles R. Street (R. 66) vice president of Great American Insurance Company, which states that such basis is universally employed by all insurance companies in their profit and loss calculations and has been so employed for forty years. (R. 67.) The Court will find by the evidence presented (R. 66-83) that the terms employed are defined

and explained in the affidavits (R. 67), and that the basis of earned premiums as income and incurred losses and expenses as outgo is sound and no evidence to the contrary was adduced. Considerations supporting soundness of such basis appear in the affidavits in the record. It there appears that the employment of earned premiums and incurred losses and expenses as a basis for insurance profit calculations is sound because:

(*a*) It is universally employed by insurance companies and recognized as sound. (R. 68.)

(*b*) It is prescribed in the annual statement blanks prepared by the respective insurance superintendents of each of the forty-eight states of the Union, upon which basis fire insurance companies report profit and loss to such states. (R. 68.)

(*c*) The earned and incurred method of calculation of insurance profit is prescribed by acts of Congress for reporting insurance profit under income tax law of the United States. (R. 69.) The act in this particular has remained identical since its enactment in 1921, differing only as to the section numbering, and so appears as:

U. S. Revenue Act, November 23, 1921, Section 246.
U. S. Revenue Act, June 2, 1924, Section 246.
U. S. Revenue Act, June 2, 1924, Chapter 235, Section 247, 43 Stat. 290.
U. S. Revenue Act, February 26, 1926.
44 U. S. Statutes at Large, Title 26, Section 1006.
U. S. Revenue Act, May 29, 1928, Chapter 852, Section 206, 45 Stat. 846.

The terms are there defined as follows:

"(4) The term underwriting income, means the premiums earned on insurance contracts during the taxable year, less losses incurred and expenses incurred."

Section 5 defines the method of calculating premiums earned, which is in exact accord with the method here employed and described in affidavits in the record. The method of computing losses incurred is prescribed in Paragraph 6, and the method of computing expenses incurred is prescribed in Paragraph 7,—each of which is in exact accord with the method employed herein.

The statute in question, by paragraph numbered 1, provides that the income earned shall be "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners." This annual statement form is employed in the State of Missouri and is described in the affidavits in this case as "annual statement." (R. 68.)

(*d*) The statutes of Missouri prohibit employment of unearned portion of the premiums in payment of dividends or other corporate purposes. (R. 69.)

(*e*) After two years' consideration of the subject by a committee from fire insurance companies consulting with the insurance commissioners of the various states of the Union, the insurance commissioners' convention declared earned premiums and incurred losses and expenses to form the proper basis of profit calculation. (R. 69.)

(*f*) It is a sound method of accountancy, universally employed in the business world, and not peculiar to insurance, in that if money is paid in advance for services to be rendered in the future and service and goods for future delivery have not yet been delivered, sound accountancy and common honesty require that money so paid in advance for service still to be rendered be set up as a liability for the unperformed or undelivered portion of the contract. (R. 71.) It is peculiarly applicable to the business of fire insurance because policies are subject to cancellation and return of unearned premium at any time by express provisions of the

policies. The earned premium method contemplates assigning to any period of time for which a profit calculation is to be made of such pro-rata of premiums on all policies, (whether written before or during such period) as pays for indemnity during such period, namely the taking that proportion of the premiums of each such policy which pays for the insurance during such period.

(*g*) There is an element of marked error in employing the received and paid method, because policies are commonly written for three and five-year periods, and if written during the test period, a great part of premium on such policies paying for indemnity beyond the test period are nevertheless taken into account as if they were income, although not paying for indemnity during the period; and as to policies written prior to the test period their entire premium is rejected, although a part thereof pays for indemnity during the test period. (R. 71.)

The method employed by the superintendent of insurance of Missouri in making the rate order in question, approved and confirmed as to such application by the Supreme Court of Missouri, authorized the superintendent of insurance as a justifiable construction of the statute, to include as an element of income the unearned portion of premiums collected during a given period and measure the adequacy of rates with such element included.

The statutes of Missouri specifically provide that every fire insurance company doing business in that state shall annually set up and show "the liabilities of the company as follows * * * fifty (50) percent of the gross premium on all unexpired fire risks that have less than one year to run, and a pro rata of all gross premiums on risks that have more than one year to run." (This is the basis for which appellant contends.)

R. S. Mo. 1909, Sec. 7013; Insurance Laws of Missouri, (1927) Sec. 6222.

The deduction of the unearned premium as a liability is one step of a calculation that leads to the surplus, and it is further provided by the statutes of Missouri that "it shall not be lawful * * * to make any dividend except from the surplus profits arising from their business."

R. S. Mo. 1909, Sec. 7064; Insurance Laws of Missouri, (1927) Sec. 6333.

The statutes of Missouri prescribe that the entire unearned premium be reserved and set aside and not treated as surplus subject to dividends or other corporate uses. By the rating statute, as construed and applied, the unearned premiums are treated as income and considered as if they were profits. The net effect of such contradictory positions is to deny to appellant the right to an income adequate to set up its required reserve and have anything left in addition thereto.

A like situation was before the Supreme Court of New Jersey, reviewing a suspension of an increased street car rate. The decision referred to is that of *Public Service Railway Co.* v. *Board of Public Utility Commissioners,* 96 N. J. Law 54, s. c. 114 Atl. Rep. 323. The railroad carrier in that case was required by order of the Commission to preserve a depreciation account, and the railroad accordingly carried such a reserve; but in determining the adequacy of rates, their sufficiency was determined without making provision or taking such reserve out before reaching the point of profits. The Court, in condemning such action as confiscatory, said:

> "To make an order requiring a public utility to set apart, yearly, a depreciation fund of a fixed amount, and to prevent a compliance by refusing the income necessary for that purpose is not the fixing of a just and reasonable rate."

The adoption of the written or paid method calculation, thus treating as profits the entire unearned premium and

making no allowance for reservation of it out of income, is an arbitrary and unreasonable exercise of power. When power is arbitrarily and unreasonably exercised it makes the whole order a nullity.

Interstate Commerce Commission v. *Union Pacific Railroad Co.*, 222 U. S. 541, l. c. 547.

The propriety of setting out a reserve for unearned premiums as an appropriate method of setting up a profit and loss statement does not rest upon first impression but has the sanction of the Courts.

Courts of the highest standing have sustained the propriety of the earned and incurred basis as a sound method of measuring profit and loss of an insurance company. We shall note the cases but briefly, for the reason that the court below did not deny interlocutory injunction to the appellant because of adoption in the bill of such basis. The conclusion of the court below was that the adoption of such basis was not an adequate ground for denying an interlocutory injunction (R. 127) and that if there be any doubt upon the subject, it should be resolved in favor of the applying insurance company. The cases which bear upon the subject briefly reviewed, are:

Sun Insurance Office, appellant v. *Clark, respondent,* (Appeal Cases, Law Reports, 1912, p. 443).

The decision by the House of Lords. It was a case arising under an assessment under Income Tax Act of 1853 in England. The tax was imposed by the intermediate court of appeal upon the whole premium income of the company for the given year, altho the proof disclosed that the company had a large number of policies extending beyond the year in question. It was the contention of the insurance company that only the earned premium should be considered because the unearned portion in no way entered into its appropriate profit and loss statement. The contention there made on

behalf of the insurance company is stated at page 446 of the opinion as follows:

> "The contention of the appellants is that as regards the risks which do not expire at the end of the financial year, the premiums received are unearned premiums, and therefore cannot be treated as profits, and that a certain percentage of the premium income ought to be carried forward in respect of unearned premiums."

The Court, per Viscount Haldane, says:

> "As Bray, J. puts it, the case is analogous to one in which if goods are bought, their value cannot be treated as profit without deducting the value of the liability to pay for them which the buyer has incurred."

Lord Atkinson in a concurring opinion says:

> "If the accounts of the company are to be rendered before the date of expiry, then some division of the premium must be made, and the portion to be appropriated to the service already rendered ascertained, the balance being appropriated to that portion of the service which is to be performed thereafter. I think the description 'unearned premium' which has been used to describe this latter portion is a very appropriate and accurate description." (pp. 460, 461.)

The contention of the insurance company is sustained and that of the crown for a received and paid basis disapproved.

In the case of *Bullion* v. *Aetna Insurance Company*, 151 Ark. 519; 237 S. W. Rep. l. c. 718, the Court in sustaining the earned and incurred method of calculating insurance profits as against a rate order says, that the unearned portion of the premium must be rejected from the accounts in setting up a profit and loss statement, and respecting such unearned portion of the premium says:

> "It is not a profit, for the simple reason that it is not earned. It may never be earned. The company could not use it for paying dividends or for other purposes of its own."

As we consider the question one upon which the decision below did not turn, we shall not make further quotation from the many cases establishing the propriety of the earned and incurred method of calculation, but content ourselves with citing them to the Court, so that the Court may examine them if it deem proper. The principal cases sustaining such basis are:

Bullion v. *Aetna Insurance Company*, 151 Ark. 519, 237 S. W. Rep. 716 loc. cit. 718.

Sun Insurance Office, appellant v. *Clark, respondent*, Appeal cases, Law Reports, 1912, p. 443 (House of Lords).

Insurance Company v. *Page & Richardson*, 17 B. Monroe (Ky.) 412.

Kenton Insurance Co. v. *Covington*, 86 Ky. 213.

Hope Mutual Life Insurance Co. v. *Perkins*, 4 Rob. (N. Y.) 182.

Scott v. *Eagle Fire Company*, 7 Paige (N. Y.) 198.

2 Cook on Corporations, 7th ed. Sec. 546, p. 1609.

6 Fletcher Encyclopedia on Corporations, p. 6104.

III.

The superintendent of insurance in making his rate order did not make the findings stipulated to be made, nor did he base his order on the same, as was stipulated should be done. By such action appellant was relieved from any obligations arising out of the stipulation.

The court below denied an interlocutory injunction to the plaintiff solely upon the basis of the stipulation above set out, which was presented in affidavit produced on the hearing. For the purposes of this division of our brief, the binding effect of the stipulation is assumed.

At the time of the hearing, the only pleading in the case was the verified bill of complaint, in which this stipulation is not set forth. The court below had an entire misconception of the stipulation and its effect. The stipulation was made before the rate hearing or order here in question and was in contemplation of a future hearing and rate order thereafter to be made.

The stipulation provided that certain findings of fact should be made by the superintendent should he thereafter make any rate order. He was to find, among other things (R. 102):

> "(*e*) * * * The ratio of expenses incurred to premiums earned * * *."
>
> "(*f*) * * * the ratio of losses incurred to premiums earned during the test period."
>
> "(*g*) * * * the total amount of earned premiums during said period."

Whatever obligations were to arise against the insurance companies are immediately thereafter recited conditionally, viz:

> "(3) That if, *based upon such findings of fact*, * * * an order reducing the rates charged * * * be made," etc. (R. 102.)

then the burdens of the stipulation thereinafter recited, should fall upon the insurance companies. It is to be noted that it was *only in the event* that the rate order was "*based upon such* findings of fact," namely, based upon earned premiums, incurred losses and incurred expenses, that any obligations on the insurance companies should arise. It appears by the rate order and the undisputed allegations of the verified bill respecting it, that the superintendent made his order on the *received* and *paid* basis, and not upon *earned* premiums and *incurred* losses and expenses. He was justified by the Supreme Court of Missouri in expressly rejecting such basis. (R. 5-11.) The court below also justifies

his rate order upon a basis rejecting any finding or conclusion upon the earned and incurred basis. (R. 126.) The adoption of such earned and incurred basis having been made a condition on which the obedience to the provisions of the stipulations were to rest upon the insurance companies and such predicate being lacking, there was no obligation, moral or legal, upon the insurance companies to obey a rate order made upon a basis directly opposed to that provided in the stipulation (R. 102), and relied upon in the bill of complaint. (R. 4, 11.) In the affidavit of Paul Terry filed on the hearing, it was stated:

> "The Superintendent did not, either in his reduction rate order of October 9th, 1922, or otherwise, make the findings specified in subdivisions (*a*) to (*g*) of Paragraph 2 of said stipulation above quoted." (R. 88.)

Paragraphs (*e*) to (*g*) expressly relate to the earned and incurred basis of computation upon which, by the stipulation, his findings were to be based. The affidavit of witness Terry that the superintendent did not make the findings as to earned premium and incurred losses and expenses as provided in the stipulation, is uncontradicted.

The statutory Court, however, draws the conclusion that, although the superintendent did not base his order upon the earned and incurred basis, nevertheless "the second purpose was substantially carried out." (R. 104.) Such second purpose as recited by the Court (R. 103), is the conduct of the hearing and findings to be made by the superintendent on such essential matters. There is no evidence whatever to sustain the conclusion of the Court so quoted. Under the undisputed record, the superintendent who asserts estoppel did not make findings or adopt the basis prescribed in the stipulation. To the contrary he adopted the *received* and *paid* basis and rejected the earned and incurred basis. Which basis shall be employed is fundamentally important. The purpose was not "substantially carried out" nor car-

ried out at all. It was expressly rejected by the superintendent. The court below erred to the injury of appellant in its conclusions.

It is anomalous to say that an estoppel exists against appellant to complain of a rate order because it stipulated to abide thereby under certain contingencies when those contingencies fail by default of him who asserts the estoppel. The chief attack by appellant upon the rate order is that the earned and incurred basis was not adopted, no findings made under it, that it was expressly rejected and that such basis is the only sound one to follow. It is now held estopped although it has consistently adhered to such basis. The superintendent is held entitled to assert an estoppel although he failed and refused to follow the conditions stipulated for which were made a *sine quo non* of the stipulation.

IV.

Appellant is not precluded from its action, nor debarred of interlocutory relief because of waiver or estoppel.

The Court concludes that it is unnecessary to retain this issue (whether or not the superintendent rejected the stipulation) to final hearing because "such deficiency (not making the findings and basing the rate order thereon), if it existed, was waived by the companies." (R. 105).

The Court concedes that if the companies were dissatisfied with the findings and basis employed by the superintendent, they could thereafter "freely take such action as they desired," which is what appellant did. This waiver, the Court says, was made by the insurance companies in that "they elected to proceed in accordance with the stipulation." (R. 105). There is not a scintilla of evidence to sustain this view, in the aspect in which we view the record. What the Court apparently means by this statement is indicated

by that which immediately follows in the opinion. There the Court says:

> "They not only (*a*) initiated the statutory review proceedings * * * " etc.

This was a statutory right and in no way dependent upon or an act of affirmance of any stipulation. It was action entirely consistent with the right conceded by the Court to exist, viz: to "freely take such action as they desired."

The Court says that waiver is further shown by the fact that appellant:

> "(*b*) omitted any attack upon the validity of the statutes or the legality of the proceeding before the superintendent."

There is no evidence whatever that such an attack was omitted. In fact, attack was made but the Courts held that such attack could not be considered because of the joint nature of the proceedings. (*Aetna* v. *Hyde*, 275 U. S. 440).

The Court says that appellant:

> (*c*) "gave the bonds stipulated and collected the premiums stipulated."

The only bonds given by appellant were those given by it with other companies in the review proceeding, as a condition of collecting excess premiums during the pendency of the suit. The only fact in the record bearing on the reasons actuating their execution is the allegation that they were "upon the order and requirement of the court" in the review case. (R. 7.) The conclusion drawn by the Court was:

> "Therefore, we must regard the matter before the Superintendent as having been fully performed in *a legal sense* by the Superintendent in accord with the stipulation, because the only alleged failure upon his part has been waived."

We respectfully submit that there is no basis whatever for asserting waiver because of pursuing the review given by the statute, or because of giving a bond on conditions exacted by the Court. In place of appellant waiving the

earned and incurred basis by such proceedings, it in fact asserted them vigorously in the courts and has never at any time, abided by the superintendent's action in discarding and refusing to employ them. We fail to see how waiver can possibly flow from a continuous attack by insurance companies upon the action by the superintendent in rejecting a basis which the stipulation provided should be employed. Neither is there any ground for saying that premiums at former rates were collected pursuant to or in affirmance of the stipulation. No act or omission of appellant is shown which was not completely warranted, regardless of the stipulation.

The Court in its opinion below, stresses the fact that the plaintiff has collected the excess rates (namely the difference between the amounts directed by the rate order and the reduced amount which would have been collected had the ten per cent reduction been applied), and the Court recites the collection and retention of this money as a consideration for the stipulation. The Court says:

> "The claim that the Superintendent had no power to agree to collection and retention of the excess pending the stipulated review, is *beside the point*, because the companies have received the entire benefit of that collection, which is fully executed. We have no doubt as to the sufficiency of the consideration."

The Supreme Court of Missouri in the case of *State ex rel Hyde, Superintendent of Insurance* v. *Westhues, Circuit Judge, respondent*, 316 Mo. 457, 290 S. W. 443, found that the power to exact and receive such excess existed in the insurance companies, irrespective of the stipulation. It was there held that the statute provides for no enforcement and does not expressly provide that in case of a reduction the companies must collect the lesser sum. It is said in that case:

> "With respect to such a reduction order, the statutes contains no specific provisions for its enforcement. The

insurance companies are not commanded to make their business rating records conform to it; they are not, in terms at least, prohibited from thereafter charging rates in excess of those fixed by the order. Nor is there any express provision making it unlawful to charge and collect the rates as they stood prior to the making of the order."

The *collection* and retention of the excess *was not pursuant to the stipulation*, but pursuant to independent power regardless of the stipulation. That the superintendent had no power to make such a stipulation is not "beside the point." It is of controlling importance. The companies collected the excess because of independent power and not because of the stipulation. If the stipulation is a nullity as the Court below virtually asserts, then no estoppel can be based upon it. It would be a poor consideration moving to appellant, if the appellant should be held estopped "because of the companies having received the entire benefit," if it cannot question the constitutionality of the rate order and the statute without first *refunding the entire amount so collected*,—which is what the Court below requires. What benefit remains to the companies if they return all they have received, before they can even be heard? The decision of the Court below in effect is that:

Firstly: By collecting the excess the appellant has received a benefit which estops it from complaining. (If the rate order is confiscatory in fact, then appellant has received nothing but that to which it was entitled);

Secondly: If the order and the statute are both void appellant must nevertheless, irrevocably forego this sum by refunding it and putting it beyond its own power to recover it as a condition of setting up the claim of unconstitutionality;

Thirdly: Having so done, let it be assumed that its claim of unconstitutionality is sustained; it is then to be given the empty determination that the money surrendered was its property and it should never have been deprived of it.

All this upon a supposed ground of waiver, whereas no intent existed on the part of appellant to waive its rights and no one has acted to his injury upon the mistaken belief that appellant did make waiver.

V.

The court below was in error in its construction of the stipulation. Appellant did not stipulate or agree to repay money to policy holders. The "clean hands" doctrine is not soundly applied to bar relief.

The opinion of the court below proceeds upon the untenable premise that by the terms of the stipulation, the plaintiff agreed to repay money to policyholders and the Court says:

> "Nothing remains to be done by anyone under the stipulation except for the companies to repay the 10% excess of premiums collected to those from whom they were collected. One of the expressed purposes of the present complaints is to prevent this repayment." (R. 105).

The Court evidently proceeds upon the assumption that the stipulation makes explicit provision that the plaintiff will repay money to policyholders. The assumption is baseless.

The stipulation provides that if a rate reduction order be made, based upon the findings of fact as regards earned premiums and incurred losses and expenses, and the companies be dissatisfied they will proceed "to secure a review thereof by a trial *de novo* in the Circuit Court of Cole County, Missouri." The entire stipulation is limited to what is to be done in such review proceeding and not any action independent of or subsequent to the review proceeding. Immediately following the words last quoted are the words "That

no injunction shall be applied for *in said matter.*" This necessarily refers to the review proceeding and all of Section 4 of the stipulation (R. 102) refers exclusively to the conduct of the parties *in the review proceeding,* the provisions being that "in said matter," namely the review proceeding:

(*a*) No injunction shall be applied for;

(*b*) "until the final determination of *said* cause" the old rate should be in force;

(*c*) the insurance companies "shall give bond conditioned and in such amount as the court may direct to refund to the assured any excess of premium collected by them, if such order * * * be finally sustained by decree or judgment of a court of last resort."

By Section 5 of the stipulation it is provided "that *in such matter* the question of constitutionality" shall not be raised. This was no more than prescribing a course of conduct of a review proceeding, in which two conditions were exacted as against the insurance companies; *first,* that no injunction was to be applied for in the review proceeding, and *secondly,* that a bond conditioned as the Court might direct should be furnished. No injunction was asked for in the review proceeding and bonds were given as directed by the Court. (R. 7). These were the only burdens that rested upon the insurance companies. Having complied with these conditions appellant is in no sense in default as to any burdens of the stipulation, even if the stipulation be binding and enforceable against it.

This identical stipulation here under consideration was before the Supreme Court of Missouri upon appeal from a contempt order in an injunction suit formerly pending in the State Court. That court, in the case of *State, ex rel Ben C. Hyde, Superintendent of Insurance* v. *Westhues, Circuit Judge, respondent,* 316 Mo. 457, 290 S. W. 443, sets forth the stipulation now under consideration verbatim and says:

"After providing for the final disposition of the cause in which it was filed, the stipulation dealt solely with

the new order and the new court proceeding to review it, which the parties then had in mind. The agreement conferred no new powers on the Superintendent of Insurance with respect to making a rate reduction order; it gave the insurance companies no additional right in respect to having such an order reviewed in a court of competent jurisdiction."

This bears out our view that the stipulation relates only to procedure in a contemplated review proceeding, all of which has been accomplished and performed and that the rights exercised by appellant were statutory and not by virtue of the stipulation.

The Court however, in the case at bar, seeks to extend this stipulation to a much broader view and to hold that it affirmatively imposes on the appellant the duty of refunding moneys respecting which the stipulation contains no provision whatever. The finding of the court below that appellant comes into equity with "unclean hands" is an unsound conclusion.

The very gist of the opinion of the court below is in the statement that they (appellant and other insurance companies) stipulated that if that litigation (review proceeding) were unsuccessful, they would repay the excess premiums collected under the stipulation. They are coming into a court of equity with unclean hands because they stand as beneficiaries under a stipulation respecting this very matter and which they refuse to carry out.

A complete answer to this statement is that there is no such agreement or provision in the stipulation. It is neither there expressly, nor by inference. The Court, after discussing the doctrine of coming into equity with clean hands, says that the plaintiff "should comply with the stipulation and make their refunds *required thereby* before asking any equitable relief. When that status has been fully established, they will be in position to proceed to have their rights determined and protected, and not before." (R. 108).

There is no term of the stipulation which can be pointed to with which the plaintiff has not complied or which it has in any way breached. There is a provision in that stipulation that bonds shall be given by the interested companies upon certain terms, which bonds were given, but there is no provision in the stipulation in any place providing for a refund to anyone.

After holding that refunding the money is a condition precedent to applying to the court, the Court says it is urged that if refunded and the order were later held unconstitutional, the money could not be recovered back. The opinion concedes that if appellant should repay to policyholders as the Court says it must as a condition of being heard at all "recovery would be impossible, or at any rate highly improbable." (R. 109). The conclusion of the Court immediately following this is most astonishing, where it is said:

> "* * * But such results is no reason for granting the injunctions."

In other words, although irreparable damage will necessarily or probably result from not granting the interlocutory injunction, and plaintiff has a case in its bill, yet relief should be denied. The Court predicates this ruling upon the premise that:

(*a*) The stipulation imposes certain conditions for refund on the plaintiff; (in which conclusion we do not agree);

(*b*) That the Superintendent has fully performed the stipulation; (which is squarely contrary to the uncontradicted evidence upon this hearing);

(*c*) That appellant has violated the stipulation (which we deny).

At the time the stipulation was made there was no suit of any kind pending, affecting the National Fire Insurance Company. The suit, which had been pending and was dismissed when the stipulation was made, was a joint proceed-

ing by all the fire insurance companies doing business in Missouri to enjoin the rate order. That suit was dismissed and the rate order vacated. Of necessity that rate order had to be vacated because it had been made without notice of any kind and was a complete nullity and this was so recognized by the attorney general. The stipulation which was entered into was respecting procedure to be followed in a statutory proceeding, providing for hearings *en masse* upon aggregate experience. It was to be an order pertaining to rates generaly without weighing or considering the experience of any individual company, and the question of confiscation or infringement of rights of individuals (as distinguished from their rights en masse) was not in consideration. There was no authority from the individual companies in such litigation to the attorneys to waive in advance any individual confiscation which might be created by the rate order. It could not be known in advance but that the superintendent would order insurance to be written for nothing. It was neither the intent on signing the stipulation that resulting confiscation was in any way waived; neither was there any power or authority in the attorneys nor intent to make such waivers for individual insurance companies. A retainer to vacate a specified rate order not directed against individual companies, by making an order affecting rates in the aggregate for all companies in the state, gave no power or authority to the attorneys representing them in such proceeding to waive their individual complaints respecting unconstitutionality of statute or confiscatory nature of rate order which might arise out of subsequent proceedings not yet initiated. That they might agree for procedure in a hearing which would determine only the aggregate experience, and not involving constitutional inquiries, might be considered as within their authority. That they could take any action which could bar the present proceeding was clearly beyond their authority and outside the intent of the attorneys or principals on

either side. The legal aspects of this situation are exemplified by the case of *Stone* v. *Bank of Commerce,* 174 U. S. 412. It is to be noted that the provisions of the stipulation are anticipatory of a rate hearing, a rate order and possible litigation which may come thereafter. As was said in the *Stone case*:

> "An attorney in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced or before he has been retained to commence one. Before the commencement of a suit or the giving of authority to commence one, there is nothing on which the authority of an attorney to act for his client can be based."

The stipulation here as construed by the court below is an undertaking to regulate governmental policy of the state for the future. The attorney general had no power to bind the state in contravention of the statutes. As was said in the *Stone case*:

> "When the agreement was made no suit had been commenced by any of the parties; no litigation in regard to matters in dispute was pending. Prior to the making of the agreement it was a question altogether in the future as to what means should be adopted and what suits commenced for the purpose of establishing the rights of the various parties as claimed by them. The question as to what course should be pursued was not one of law only,—it was also one of policy. The stipulation actually entered into was of an administrative, as well as of a legal nature, involving the administration of the law regarding taxation and the best means of determining the legal questions involved in the dispute, while at the same time obtaining, so far as possible, payment of the taxes claimed by the commissioners of the sinking fund as due from the various banks and trust companies. These were questions which an attorney would have no power to decide and concerning which he would have no power to make any agreement." (loc. cit. 421).

The Court also says:

> "When an attorney has been retained, he has certain implied powers to act for his client in a suit actually com-

menced in the due and orderly conduct of the case through the courts. * * * Nothing of the kind exists in the agreement here in question. It is more than a mere agreement of an attorney to abide the event of a decision in an actually existing suit. This agreement was not in the execution of the general power of any attorney to decide upon the proper conduct of a suit then on its way through the courts. It was an agreement much more than that and of a different nature. As we have said the question to be determined was one of policy, as well as of law, eminently one for the consideration of the city authorities, its mayor and its general council, aided and assisted by the advice of the attorney for the city. But it was a decision of a corporate nature and not one to be decided by any but the corporation; and it was one which we think was beyond the power of an attorney to make, while acting merely in his capacity as an attorney, before suit brought and without specific authority." (loc. cit. 422).

The attorney general of the State of Missouri had no power by his representation of the insurance superintendent, to bind him as to future actions vested in him by law and this lack of authority was expressed by the Supreme Court of Missouri, in the case of *State of Missouri, ex rel. Ben C. Hyde, Superintendent of Insurance, Department of the State of Missouri, Relator,* v. *Westhues, Judge of Circuit Court, Respondent,* 316 Mo. 457, 290 S. W. 443, involving the identical stipulation here, the Court holding that neither the attorney general nor the superintendent of insurance could bind themselves as to the future conduct of the superintendent, stating:

"The conditions prescribed by the statute are alone determinative of his duty and authority in the premises. This proposition is so evident that the citation of authority is deemed unnecessary."

The stipulation could not be held valid if it fixed the status of insurance rates in any way and the Supreme Court of Missouri, in the case last cited, said of this stipulation:

"That agreement, as we have endeavored to show, did not attempt to fix 'the status of insurance rates'," etc.

The statutory court from which this appeal is taken has treated the stipulation as fixing the *status of rates* and fixing them so firmly that they are not even the subject of attack for confiscation or unconstitutionality. If as must be assumed, the statute in question is unconstitutional and invalid and the rate order is confiscatory and void, then the lawful rates of insurance premium are those which the plaintiff has exacted and to the present time retained. To hold that an estoppel arises against the appellant, such conclusion must rest upon the theory that it has profited by what has occurred or the state has been harmed. If the statute and the rate order are nullities then the rates which appellant collected were legal rates and no more than it was entitled to collect. If it has collected no more than it was entitled to collect and retain, it has collected nothing inequitably and no basis for an estoppel can arise.

It is obvious from the foregoing considerations that there is no element in the stipulation which can have any effect to bar the present action. The Statute of Missouri is capable of two constructions,—either that the statute expressly prescribes confiscation; or that the statute permits the superintendent to allow the old rates to be collected pending review proceeding.

In the first view the statute is clearly unconstitutional.

In the second view, the appellants gain nothing by the stipulation, for the superintendent was only exercising a power which already existed in him by express statute. The statute, as it existed when the stipulation was executed, provided:

> "During the pendency of such action or review, each insurance company or other insurer shall not charge any rate or premium in excess of that *fixed by the Superintendent* of Insurance."
>
> Laws of Missouri, 1915, page 313.

This may mean that the insurance companies could only charge the newly reduced rates pending review. If so it expressly commands confiscation, if the newly fixed rate was, in fact, confiscatory. The statute however, does not expressly state that the rate charged shall not exceed that *fixed* by the superintendent *in his rate order*. It is consistent with the language of the statute for the superintendent to reduce rates by a rate order, and fix another higher level, (pre-existing rates) as the rate to be collected pending review. To save the statute from condemnation as a confiscatory act, it was stipulated that in the event he made an order reducing rates, he should *also* make an order permitting old rates to be collected pending review upon the giving of bonds. This was no more than a reasonable construction of the statute and therefor appellant gained nothing by the stipulation, for the superintendent was empowered and should reasonably so act in the absence of any agreement. The stipulation therefore, was of no more force and effect than had the attorney general joined in the stipulation saying "If the Superintendent makes any rate order in the future, he will make it reasonably, so that it will not be so unreasonable on its face that any court would immediately enjoin it."

No estoppel can arise against a person subject to rate regulation by accepting from the superintendent an agreement to which they mutually subscribe, to the effect that the superintendent agrees in the future to act with some degree of reasonableness.

The provisions in the stipulation as to what the superintendent proposed to do upon a possible new hearing was not binding upon him, as he could have a hearing or not, as he saw fit; give notice or refrain from it, as he thought proper; and in fixing rates proceed, in obedience to the statute which he had no power to enlarge or restrict by stipulation.

Upon making of a rate order by the superintendent, if he should make one, the appellant had a right to attack it in any

way it saw fit, and could not be limited by an agreement made by attorneys in a previously dismissed suit before the rate hearing was had and before its rights were infringed.

Appellant has taken no action whatever which it was not entirely free to take under the law, regardless of any stipulation, has acquired no advantage and no premiums which it had not full power to acquire, regardless of the stipulation.

For these reasons, we say, that the plaintiff has had no advantage and the defendant has suffered no damage by any action done or omitted because of the existence of a stipulation. No action has been taken either by the superintendent or by the plaintiff pursuant to or under the stipulation or purporting to conform to it or be controlled by it.

The statutory court below assumed that there was great vitality in the provision respecting the conditions of the bond to be given by insurance companies upon instituting review proceeding in the courts of Missouri. The parties could not by any stipulation in advance of the institution of a suit, bind the court to accept or approve any particular bond. An attempt to make a stipulation binding upon the courts in future proceedings, was before this court in the case of *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281. The parties there stipulated upon facts "for the purpose of review only from the common pleas court." This stipulation was made after the order of the court had been made upon a demurrer which had the legal effect of confessing the complaint. This Court holds that such a stipulation is a nullity and that "no stipulation of parties or counsel, whether in the case before the Court or in any other case, can enlarge the power or affect the duty of the Court in this regard." Obviously the conditions of any bond to be exacted from plaintiff and other companies was in the control of any court in which a proceeding might thereafter be brought and the Court could exact a bond on such terms as it though proper. The fact that after the institution of review proceedings, the plaintiff

furnished a bond in pursuance of court order upon the terms prescribed by the Court cannot be creative of an estoppel, even if the parties had agreed before any suit was brought what the terms of such a bond would be if there ever were any.

The stipulation was clearly applicable to the procedure in the review proceeding alone and did not purport to affect the rights of the parties as individuals after exhaustion of the aggregate or *en masse* review proceeding. There was no waiver of constitutional rights, express or implied, by the respective insurance companies, and none by appellant, but at most only procedure defined for a specific contemplated court proceeding. To extend it to operate as a general waiver of invasion of individual constitutional right at all times and in all places is to give it a meaning and an intent entirely foreign to the express or implied intention of the parties.

In the case of *Burnham* v. *North Chicago Street Ry. Co.*, 88 Fed. Rep. 627, the Circuit Court of Appeals for the Seventh Circuit had for consideration a stipulation waiving a jury and submitting a case to a Court. The Court held such a stipulation did not operate as a waiver of jury trial as to subsequent trials in general, but only in the specific trial then in contemplation, and said:

> "The right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence and is expressly guaranteed by the United States Constitution. A stipulation for the waiver of such right should therefore be *strictly construed in favor of the preservation of the right.*" (Italics are ours).

A like construction of the stipulation in the case at bar, namely, a strict construction in the favor of the preservation of constitutionality, makes the opinion of the lower court untenable.

The intent of the stipulation was that in the review proceeding the statute as written, should not be attacked as un-

constitutional. If it should be applied or construed thereafter by the superintendent or thereafter construed by the Supreme Court, so as to write unconstitutional terms into it or apply it unconstitutionally to individual insurance companies, it was not in contemplation that complaint of such invasion of right should be debarred. The stipulation was not operative to prevent the present plaintiff from attacking a subsequent rate order as confiscatory and attacking the statute as it might be construed thereafter by the Supreme Court of Missouri, and as it might be applied and justified by the Supreme Court. The stipulation that the companies would not in the aggregate review proceeding attack the statute as written, is no bar to the present proceeding attacking the statute as construed and applied in a rate order justified by the Supreme Court of Missouri. The distinction between an attack upon a statute as written and an attack upon such statute as administered and justified by the Snpreme Court of the State, is pointed out in the case of *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S., loc. cit. 484.

VI.

The stipulation did not fix the status of insurance rates. The powers and duties of the superintendent were affixed by statute. He could not bargain respecting them. The stipulation therefore was lacking in mutuality and had no binding effect.

The stipulation cannot be effective as an "estoppel" as the Court calls it (R. 129) because the stipulation is entirely lacking in any mutuality. The appellant had the right, entirely regardless of the stipulation, to file a review proceeding and to exact pre-existing rates. The Supreme Court of Missouri, in the case of *State ex rel. Hyde, Superintendent of In-*

surance v. *Westhues, Circuit Judge, respondent*, 316 Mo. 457, 290 S. W. 443, considered this identical stipulation and the statutes giving power to the superintendent. The Court in that case held that the stipulation could not enlarge or restrict the action of the superintendent of Insurance in any particular, and says:

> "The Superintendent of Insurance cannot so bind himself. The conditions prescribed by the statute are alone determinative of his duty and authority in the premises."

The statutory court from which appeal is taken is in error in assuming that the stipulation is a mutual agreement which fixed the status of insurance rates. The Supreme Court of Missouri, in construing this agreement says:

> "That agreement, as we have endeavored to show, did not attempt to fix 'the status of insurance rates,' It dealt solely with the conduct of the parties and the procedure to be observed in a specific court proceeding."

VII.

If the stipulation be construed as a waiver in advance of infringement of guarantees of the Fourteenth Amendment, it is void. Appellant was under duress.

The rate reduction order which preceded the one here under litigation, was made on January 5, 1922. It provided for a fifteen per cent reduction in rates. It is fully set forth in the affidavit of Paul W. Terry (R. 83). It was upon the vacating of such rate order and dismissal of the suit brought to enjoin it, that the stipulation in question was executed. The rating statute as it existed in January, 1922, when the stipulation was executed, provided for a review proceeding, but provides:

> "The orders and directions of the Superintendent of Insurance, together with his findings or determinations of fact, upon which such order or determination is

founded, shall be reviewable by a proper action in the courts. * * * During the pendency of such action or review, each insurance company or other insurer shall not charge any rate or premium in excess of that fixed by the Superintendent of Insurance."

Laws of Missouri 1915, page 313; Revised Statutes Missouri 1919, Section 6284.

The statute provided that during the pendency of any "*such action or review,*" the rate "fixed" by the superintendent should be charged, thereby providing for day by day confiscation, if the rate fixed was, in fact, confiscatory. Not only were the insurance compainies thus subjected to possible confiscation by the language of the statute, but there was no provision in the statute for notice or hearing, but Section 6283, Rev. St. Mo. 1919, provided that the superintendent was "empowered to investigate the necessity for a reduction of rates, and if upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation, shows there has been an aggregate profit therein in excess of what is reasonable, "he shall order such reduction of rates as shall be necessary," etc.

Not only was there no provision in the statutes for notice or hearing, but it appears affirmatively in the record herein that "this rate reduction order (in effect when the stipulation was made) was made by the Superintendent without any notice whatever to any of the fire insurance companies doing business in Missouri, and without any notice to the Missouri Inspection Bureau, and without any hearing or opportunity to be heard according to any of said companies or said Bureau." (R. 84.)

The fact that there was to be any rate order, or that one was under consideration, first came to the attention of the insurance companies "after the order made and promulgated by the Superintendent." (R. 85.)

The insurance companies, of whom appellant was one, filed suit to enjoin such order, which was clearly and uncontradictedly an unconstitutional, void order. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 412. While the same was being litigated, day by day confiscation of the property of appellant and others would occur. It was in this situation that the stipulation was entered into, which is the subject of this discussion. (R. 85.) It seems to us that discussion or citation of cases is scarcely necessary to show that:

(1) Such former rate order would ultimately have been nullified;

(2) Until the same was nullified (probably not until this court was reached), the insurance companies would be subject to day by day confiscation;

(3) The insurance companies in this plight, were under implied duress of arbitrary action, whereby they might have their licenses revoked. Section 6287 of the Rating Act expressly providing for cancellation of license for violation of Section 6283 already mentioned.

A part of Section 6287 as it then existed, reads as follows:

> "The Superintendent of Insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion, revoke the license of such offending company, officer or agent."

The court below erred in its ruling that there was a valid consideration free from elements of implied duress inducing waiver of constitutional rights (in the event of further invasions in the future). There was no other escape from immediate confiscatory acts of a state. The appellant (and other insurance companies) had its choice between the alternatives:

(*a*) Submit to confiscation of its property day by day, as expressly directed by statute; or

(*b*) To refuse to comply with the express provisions of the statute and thereby incur the penalty of cancellation of its license and lose its established business in the state.

Having this choice of evils, one of which was scarcely preferable to the other, the superintendent offered, on prescribed conditions, to release appellant and other insurance companies from this situation which the lawless statute of the state had created. The superintendent stipulated with the appellant and other insurance companies that they (the superintendent and such insurance companies), would construe the statute (providing that pending any review or action attacking the rate order of the superintendent, the "insurer shall not charge any rate or premium in excess of that *fixed by the Superintendent* of Insurance") as empowering him to perpetuate preexisting rates pending review. It was provided that the superintendent would withdraw his unconstitutional and lawless action so made without notice or hearing, and would give notice and have a hearing thereafter. To the point of granting a notice and hearing, the parties stipulated for nothing not provided by the statute. The statute did not require any notice or hearing or provide for one. In this respect also that statute was unconstitutional. Surely appellant gained nothing to the disadvantage of the superintendent when it was accorded notice of a proposed hearing.

In other words, the parties sought to create constitutional safeguards by agreement, for which the statute made no provision. After such notice and hearing, if the superintendent made a rate order reducing rates, (which it was not required by the stipulation he should do), then it was provided that pending the review proceeding, the superintendent and the insurance companies would proceed under their mutual construction of the statute, in that the statute expressly provided that the insurers should not charge any premium in excess of that

fixed by the superintendent, whereas the stipulation provided that the insurance companies might charge the old rate which he *fixed* pending review if he followed the agreement.

The effect of the opinion of the court below in the case at bar, is that the superintendent had power to and did stipulate with private citizens that he would proceed squarely in contravention of the statute, which statute it construes as an unconstitutional enactment expressly providing for confiscation. If the statute means what the Court implies that it does then the administrator of an expressly confiscatory statute has by the terms of such a null statute greater power than he would have under any conceivable valid law. In so stipulating, let it be assumed his motives were the best, namely, to extend to the insurance companies the constitutional right to be exempt from confiscation, guaranteed by the Fourteenth Amendment of the Federal Constitution, but the fact remains that if the court below is right in its construction he was making an agreement beyond his powers, because expressly contrary to the statute under which his powers arose. The effect of the stipulation, stripped of its detail, is that:

1. The superintendent of insurance recognizes that he has committed a violation of the constitutional rights of citizens within the jurisdiction of his state, by making a rate reduction order without notice or hearing;

2. A failure to comply with such order on the part of the insurance companies will, under the statute, subject them to cancellation of their license and thereby destroy their established business in the state;

3. In this situation it is proposed that the superintendent vacate such unconstitutional order, the only alternative to the insurance companies being that they will be compelled to submit to day by day confiscation, or cancellation of their licenses;

4. With this sorry alternative before them, it is proposed to relieve them of the confiscatory rate order and threat of revocation of their licenses upon condition;

5. The condition imposed, is that if the superintendent later make a reduction order pursuant to notice and hearing, (which were not provided by the statute and which therefore proceeded from his grace alone) and after such hearing he makes a reduction order on the basis specified, that then the following supposed mutual obligations of the parties shall arise:

   (*a*) The attorneys for the superintendent, the chief law officers of the state, make an agreement for a state official, that he will fix the rate pending review at old rates until the matter is tested (or if the court below is to be followed, violate the law, by permitting the insurance companies to collect premium in excess of that fixed by the superintendent of insurance). The superintendent had no power to agree to violate a valid statute because he would thereby agree to violate the statute under which his powers arose. The Attorney General had no power as an attorney, to stipulate that the superintendent should violate the law or to bind him to do an act contrary to the statutes which controlled his action;

   (*b*) The attorneys, representing the insurance companies in the aggregate suit to enjoin an aggregate order for reduction of rates, had no power to bind the individual insurance companies, as respects their individual action for the future. They had no power to waive infringements of constitutional right anticipated as possibilities in the future, not involved in the then pending litigation, and respecting rights and liabilities which had not yet accrued. The insurance companies would no more be bound by such an agreement, if they made it themselves, than if made by the lawyers representing them.

The situation was one wherein an implied duress existed consequent upon lawless action of the superintendent, with the constant threat of the statute providing for cancellation

of license. *Atchison, Topeka and Santa Fe Railway Company v. O'Connor*, 223 U. S. 280.

The element of duress is completely destructive of the appellees' claim of estoppel. In *Union Pacific Railway Company v. Public Service Commission of Missouri*, 248 U. S. 67, the Court considered a case where a railroad applied for a certificate authorizing issue of bonds, and the Supreme Court of Missouri held the railroad estopped from complaining of the unconstitutional nature of fee exaction, because it had voluntarily made an application in writing for a certificate authorizing the issue of bonds. The Supreme Court of Missouri in that case, held that the action of the railroad was voluntary and that it was estopped. This Court held that no estoppel arose, and said:

> "On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of bonds. The statutes if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The railroad company and its officials were not bound to take the risk of these threats being verified. Of course it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that the choice was made according to interest does not exclude duress. It is the characteristic of duress properly so-called."

It was suggested in that case that the state might have disregarded the statutes providing for penalties, or would not enforce the unlawful exaction, but this Court said:

> "The railroad company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils that made it practically impossible not to comply with the terms of the law."

The same situation here exists. Each of the insurance companies doing business in Missouri issued many policies

daily and each issuance of a policy at the formerly existing rates would be a violation of the statute and would involve the revocation of license of the insurance company and of its agent, and in addition would subject the officers, agents and reperesentatives of the companies to the other penalties of the statute. The picture of duress is complete. Among the other penalties provided, for proceeding in violation of the statute, are that:

> "Any fire insurance company, or any director or officer thereof, or any agent or person acting for or employed by such company, who * * * shall wilfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful * * * or shall be guilty of any infraction of this article, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof, be punished by a fine not to exceed $500.00 for each offense."

The case of *Swift & Company* v. *United States,* 111 U. S. 22, was a suit involving stamps upon proprietory articles, commission upon which, under proper construction, was payable in cash and not in stamps, as claimed by the Internal Revenue Department. Each purchase was upon a written order. Written receipts were demanded, disclosing full payment of the commission. An account was kept upon which there was a memorandum placed stating the account to be correct, complete and true, which was required to be signed by the claimant. This Court says:

> "The question is whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting upon its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was within the power of the officers of the law and could only do as they required. Money paid or other value parted with under such pressure has never been

regarded as a voluntary act within the meaning of the maxim *volenti non fit injura.*"

Robertson v. *Frank Brothers Company,* 132 U. S. 17.
Gaar Scott & Company v. *Shannon,* 223 U. S. 468.

Even if it might be said that appellant might have had a right to sue and might ultimately have won in its suit, as was said in *Atchison, Topeka and Santa Fe Railway Co.* v. *O'Connor,* 223 U. S. 280, l. c. 286:

> "The penalty would go on accruing during all the time that might be spent before the validity of the defense would be adjudged. As appears from the decision below the plaintiff could have had no certainty of ultimate success. We are of opinion that it was not called upon to take the risk of having its contracts destroyed and its business injured and of finding the tax more or less nearly doubled in the case it finally had to pay. In other words we are of the opinion that payment was made under duress."

VIII.

A stipulation was made by attorneys representing all stock insurance companies en masse. It did not and could not bind the several insurance companies to forego assertion of individual infringement of constitutional right thereafter accruing.

There was no contract estopping the claim of confiscation.

The agreement having been made January 5, 1922, before the hearing and before the rate order of October 9, 1922, it was not the intention of the stipulation that the parties individually waive the right to question constitutional invasion of right if it should occur upon an order thereafter made. It related only to a specific controversy respecting aggregate experience, in which constitutional attack upon the statute was not to be made and which the Courts have since held was a proceeding in which constitutional claims of confiscation could not arise. If we are correct in the position that

the rate order and the statute authorizing it are creative of a constitutional invasion of right as against the appellant and that its property is confiscated, then a stipulation made under duress of a prior rate order, cannot bar appellant's constitutional attack. The effect of the decision of three judges is that the action of appellant in refusing to conform to an admittedly confiscatory rate order, is creative of an estoppel and that appellant and other insurance companies by their stipulation, in advance agreed that they would submit to any subsequent confiscation no matter how destructive. If they had so agreed, the agreement would be a void one and not binding upon them. In *Banton* v. *Belt Line R. R.*, 236 U. S. 414, it was held that the action of a railroad company in *accepting* and *putting in effect* a rate order "did not surrender the protection of the Fourteenth Amendment if the order was found to be, or if thereafter it should become, confiscatory." There is even less ground for assertion of an estoppel in this case, wherein the appellant refused to reduce its rates to a confiscatory level.

The State of Missouri may not hold that plaintiff waived its right to resort to a federal tribunal for invasion of rights granted by the Federal Constitution, by pre-existing stipulation or agreement. This is definitely decided in the case of *Insurance Company* v. *Morse*, 20 Wallace 445, where it is said that:

> "Every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all these courts may afford him. A man may not barter away his life or his freedom or his substantial rights."

If his constitutional rights have been invaded he may forego them, but it was said in the same case:

> "He cannot however, bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights at all times and on all occasions whenever the case may be presented."

See also *Barron* v. *Burnside*, 121 U. S. 186.

The right to complain of confiscation and denial of equal protection are guarantees no less important than the right to resort to a Federal Court in a proper case. The right is an absolute right and this Court says of the right to resort to a Federal Court that:

> "Any agreement, *stipulation* or state law precluding them from this right is absolutely void,—just as void as would be an agreement not to resort to the said courts for redress of wrongs or defense of unjust actions, or as would be a city ordinance prohibiting an appeal to the State courts from municipal prosecutions."
>
> *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535.

(Dissenting opinion subsequently adopted as the view of this Court in *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 533.) If a stipulation is void which prevents resort to a Federal Court in future situation which may warrant it, then a stipulation to the effect:

> "If Missouri takes my property without due process of law by proceedings not now *in esse*, I agree that I will not bring suit to enjoin such action but abide by it even if it destroy me."

is also void. The exaction by the state from those within its borders of an agreement not to assert constitutional grounds if the state thereafter trespass on rights, is void "whether waived in advance or not."

Terral v. *Burke Construction Co.*, 257 U. S. 529.

The hearing before the superintendent and his rate order were hearings upon aggregate experience and related to an order applicable to companies in the aggregate. It did not relate to the experience of any particular company, nor did it rest upon the experience of an individual company, nor was the question of confiscation as respects an individual company legally involved. The stipulation in question dealt entirely with the determination of aggregate experience to be ascertained upon the earned and incurred basis and provided that the superintendent should make an order "based upon such findings of fact" which, if made, should be respecting "the rates charged by such stock companies on all fire

lightning, hail and windstorm insurance business written by them in the State of Missouri." It did not relate in any way to determining the rates of the plaintiff as a separate entity, nor did it provide that the plaintiff should not secure an injunction, but that no injunction should be applied for "in said matter," in which the companies proceeded *en masse*. There is nothing in the stipulation binding the plaintiff as a separate entity in any way and it is left entirely free in a proceeding instituted solely by itself, to proceed for an injunction or to take any action it might see fit. The stipulation does not purport to be made for this appellant as a separate entity, but only on behalf of the companies *en masse*, as related to a proposed hearing *en masse* pursuant to which an order was to be made regulating rates in the aggregate, to be reviewed by a proceeding by companies in the aggregate.

If the rate order here in question is confiscatory,—which the record discloses that it is,—appellant cannot be precluded from challenging its confiscatory nature because of contract or agreement to submit to confiscation.

The commonest case in which this issue has arisen is in those cases where a five-cent fare franchise equivalent to a contract has been accepted by a street car company. Every Court before which such matters have come for determination, has held that if it was confiscatory in fact a greater rate should be allowed enabling the utility to function. The effort to base an estoppel in such cases has invariably failed. As this Court said in *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433:

> "The rate making body cannot substitute for a just and reasonable rate, a lower rate, either on the ground of policy or on the ground that the railroad was, by its former conduct, estopped from charging a reasonable rate."

McFarland v. *American Sugar Company*, 241 U. S. 79, 85.

Union Dry Goods Company v. *Georgia Public Service Corporation*, 248 U. S. 372, 9 A. L. R. 1420.

IX.

The Missouri Rating Statute violates the equal protection clause of the Fourteenth Amendment, in that it regulates rates of stock fire insurance companies and does not apply to other insurance doing an identical business.

The rating statute of Missouri hereunder attack, is made applicable only to stock fire insurance companies, whereas other stock insurance companies can be and are organized under other sections of the Missouri statutes and the burdens of the regulation are not made applicable to such other stock insurance companies writing identical business, nor is the regulation application to mutual or reciprocal companies, or individual insurers, although large amounts of competing insurance are written by all such insurers (Bill of Complaint, Par. 12-i, R. 16, 17). The statute is violative of the equal protection clause of the Constitution in this respect.

Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494.

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389.

X.

The rate fixing here under review is an unconstitutional invasion of right. If it may be justified by the ruling in German Alliance Insurance Company v. Lewis, 233 U. S. 389, then the decision in that case should be modified.

A substantial question exists in this case in the claim made in the bill of complaint, that the power to fix rates upon aggregate experience basis, without any inquiry as to the individual situation of the plaintiff, and upon a basis different from that employed in other states, is subversive of the whole plan of insurance and destructive of the balance in the business necessary to its conduct.

This leads to the allegation in the bill that the business of insurance is not affected with the public interest, in the sense that the state may prescribe rates to be charged, at least upon the basis and upon the considerations contemplated in the Missouri statute, and that the state has exceeded is justifiable police power in the enactment of this statute, as it has been applied in the instant case to appellant.

We recognize that the subject of limits of police power is a most difficult subject, and it is asserted and claimed in the bill and now asserted, that the case of *German Alliance Insurance Company* v. *Lewis*, 233 U. S., page 389, should be disapproved, or at least held not to warrant interference with the appellant's business, as is contemplated in this case.

We shall not argue this matter *in extenso* in this brief but recall to the Court what this Court said in *Tyson and Brothers Union Theatre Ticket Offices, Inc.* v. *Joab H. Banton, as District Attorney*, 271 United States 418, 47 Supreme Court Reporter 426, 71 Law Edition 493 (October term, 1926). The Court there reviews the *German Alliance case* and the views expressed in it. The opinion in *Tyson case* discussing the *German Alliance case* says:

"(1) That case 'marks the extreme limit to which this court has thus far gone in sustaining price fixing legislation.'

(2) The difference between insurance and other business, which justify attachment of the police power of the state to insurance rating are:

'That in an insurance business, each risk was not individual; that "there can be standards and classifications of risks determined by the law of averages," and, while there might be variations, that rates are fixed and accompanied to such standards.'

(3) The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by

other communities; great catastrophes are thereby lessened and it may be repaired."

(4) "The contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the assured, possessing great power thereby and charged with great responsibility."

(5) The decision proceeds upon the ground that the insurance business is to be distinguished from the ordinary private business; "that an insurance company is, in fact an instrumentality which gathers funds upon the basis of equality of risk from a great number of persons—sufficiently large in number to cause the element of chance to step out and the law of averages to step in as the controlling factor, and holds the numerous amounts so collected as a general fund to be paid out to those who shall suffer losses."

(6) "Insurance companies do not sell commodities; they do not sell anything. They are engaged in making contracts * * * the effect of their activities being to constitute a guarantee against individual loss and to put a large number of individual contributions into a common fund for the purpose of fulfilling the guarantee."

(7) "It was from the foregoing and other considerations peculiar to the insurance business that the court drew its conclusions that the business was clothed with a public interest."

The corollaries of these propositions are:

(1) The limits of price fixing legislation may not be extended except upon the grave conclusion that the public good will be so injuriously affected by not extending the police power, that action by the state may be justified because the public good offsets private disadvantage.

(2) Premium charges are greater for a five-year term than for a one-year term. A rate regulation order which ignores such time element in measuring income (by not giving credit for unearned premiums in stating income for a period of time) is destructive of the standards and classifications of risks applied when the premium is exacted, and, therefore

destructive of the law of averages upon which the business rests.

(3) A common standard throughout the country is necessitated by the law of averages, upon which insurance fundamentally rests. If differing standards may be employed at will in the various states (Missouri setting up an arbitrary standard not existing elsewhere), the distribution of loss is limited as to area; losses are localized and not spread over the country; disasters are limited to relatively small communities, and great catastrophes are not lessened.

(4) The controlling function of the police power in regulating insurance must be directed to insuring solvency; for a company that collects premiums and cannot pay its losses has failed in the primary essential of the business. The adoption of a method of profit measurement which obscures the credit standing of the companies and tends to destroy credit and lessen the integrity of the insurance fund cannot be supported on any reasonable theory of the application of police power.

(5) The abandonment of the theory of reserving funds to meet losses of the future which have been contracted against, relegates insurance to the status of private business. It treats contracts as independent and fails to take into account the essential peculiarity of interdependence. To refuse to provide reserve for the protection of interdependent contracts to be fulfilled in the future, is a denial of the essence of sound insurance. The distinguishing characteristic of insurance is abandoned if appropriate reserves for the future are to be eliminated from calculation designed to show profit. A method of calculation which makes no provision for obligations incurred and which must be met in the future and treats them as non-existent, relegates the entire matter to chance and destroys the application of the law of averages.

(6) The fundamental purpose of insurance contracts being a guarantee against individual loss, if outstanding contracts upon which losses may occur in the future are not provided for before striking a profit balance, then the means of fulfilling the guarantee provided in the contract is destroyed.

(7) If the considerations which impelled this Court to hold that the business of insurance was clothed with a public interest are to be abandoned; then the reasons failing, the conclusion also fails, and insurance cannot be held to be clothed with a public interest.

In the minority opinion of Mr. Justice Bradley, in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, (which minority opinion is now the law governing this court. Mr. Justice Bradley says:

> "The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring states would not only cripple their energies, but would deprive the people of those States of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefit of the most extended average. The needs of the country require that corporations, at least those of a commercial or financial character, should be able to transact business in different states."

It cannot be said that because the police power of Missouri is co-existent with the boundaries of the state, that what occurs in other states is a matter of no materiality. In fact, the broad averages employed in the business require a con-

sideration primarily of the experience in the State of Missouri. This does not, however, permit standards in Missouri endangering interdependent contracts in other states. The statutes specifically recognizes this in its provision that consideration shall be given to the conflagration hazard within and without the State of Missouri. Such provision, if faithfully carried out, cares for one of the essential extra-territorial considerations.

Another consideration which cannot be ignored is the fact that a tornado sweeping over three or four states may produce losses so great in those states that it would not be practicable for the companies ever to make charges to meet their losses out of the premiums of such states. The occurrence of conflagrations in the same year in two or three large cities of the country might produce losses so staggering, that the states in which they occurred might not show a profitable experience over a period of 50 or 100 years of time. To penalize the business of that state by charges designed at all events to meet such loss would put them at a great disadvantage with other states. It is neither desirable nor practicable to do so. The consequence is that the profit limits measured by the experience in any given state must be most liberal before the restraining power of the state may be exercised. The common statement of the limits of exercise of police power is that it must be "reasonable"; it must "not be arbitrary," etc. These general terms are so flexible that they do not always serve to direct the mind to a single conclusion. We respectfully submit the following observations, designed to aid the Court in defining the matter.

The police power, in general, extends to the (1) public health; (2) morals; (3) safety; (4) regulation of business devoted to the public use or clothed with a public interest. In the case of the public health and safety, more or less summary action may be permitted—as, in destroying a build-

ing in the course of an oncoming fire, to save other property; or the quarantine of those afflicted with contagious or infectious diseases.

In the case of police regulations affecting morals, a less summary procedure may, in general, be permitted; so that a person suspected of operating a bawdy house, may not have his rights summarily destroyed, but is entitled to some kind of a judicial inquiry before action may be taken.

In the case of business affected with a public interest, which is inherently lawful and so recognized to be, the regulations must trench on private rights as little as is consistent with conservation of the public interest. So it has been held that the grant of authority to an insurance commissioner, to grant or refuse licenses to agents and to cancel licenses according to his unqualified judgment, is beyond the exercise of proper police power.

Welsh v. *Maryland Ins. Co.*, 47 Okla. 933, 147 Pac. (Okla.) 1046; L. R. A. 1915 E. p. 108.

So a statute prohibiting an insurance company from having more than one agent in given territory has been held to be beyond the proper sphere of the police power.

Northwestern Nat. Ins. Co. v. *Fishback*, 130 Wash. 490, 227 Pac. Rep. 516 (Wash.).

A statute, limiting the price of food stuff to "reasonable" prices, without any definition of reasonableness, is a void enactment.

United States v. *Cohan Grocery Co.*, 255 U. S. 81. 41 S. C. Rep. 298, 65 Law. ed. 516.

Nor may Courts read into a statute what is not there under the guise of construction.

Importers & Exporters Ins. Co. v. *Rhodes*, 239 New York 420; 146 N. E. 648.

The business of insurance is a highly complex business, the making of equitable rates in which is involved in scientific estimations of probability, many, if not most, of which are determined in laboratories, where, by test and experiment, the fire resistive qualities of objects are ascertained with great nicety, and rates predicated upon elements involving structure, exposure, protection and combustibility of contents. The affixing of rates upon inflammable oils and pig iron, to determine the relatively proper charges, presents problems of the greatest nicety. These considerations involve, also the distribution of equitable charges between different communities, so that the charges may be equitably distributed as between the different communities in a state. A proper perspective contemplates also an equitable distribution between states involving considerations of the different structures in the various states, the differing insurable properties there existing and their qualities, as in case of cotton in one state and grain in another; the difference in climatic conditions, taking into account the aridity of one and the heavy rainfall or snowfall in another. The balance of all these elements one against the other is what permits equitable charges so that a merchant in one state may have assurance that the burden of the insurance tax his industry bears shall not be disproportionate to the insurance tax of his competitor—perhaps in a remote state. It seems to counsel that questions of the importance of those here presented should not be determined against appellant on an interlocutory hearing. There is not even an answer on file and may never be any if the Court adheres to the views expressed. It is conceded that irreparable damage will result if injunction do not issue. The balance of injury is such that these important questions might well be reserved to final hearing under proper safeguards.

XI.

The questions here involved are of such importance they should not be determined adversely to appellant on interlocutory hearing.

The stipulation which furnishes the ground for the Court's denial of an interlocutory injunction is not set forth in the bill of complaint, nor in any pleading by the defendant. It appears only in affidavits which were submitted on the motion for interlocutory injunction. Aside from its lack of binding effect, which might be determined from the face of it, the following questions are still open and should not have been determined against appellant at this stage:

(*a*) The insurance companies in proceeding with a review proceeding and giving bonds on the review proceeding either did so as compliance with the stipulation or did so in pursuance of their rights under the statutes and laws of Missouri, independent of such stipulation. These are matters which ought not to be decided against the contentions of the plaintiff on an interlocutory hearing. The balance of injury is such that irreparable harm will result to the plaintiff upon the denial of the injunction (which the court in its opinion concedes) and no harm would be done to the [redacted] or to policyholders of the State, so long as they were properly secured, by deferring determination of the question until final hearing. A much greater assurance of a sound conclusion would exist by so deferring decision.

(*b*) If the stipulation were set forth in an answer (it not appearing in the Bill of Complaint in any way) then the plaintiff should have the right to controvert its effect, if prima facie a bar by showing, if appellant could, that it had been waived by the Superintendent, or that he had in his hearings and in his rate order failed to conform to it, and thereby produced an abandonment of its terms by both parties. If the matter proceeded to final hearing, aside from legal contentions as to its construction and effect,

> plaintiff would insist and assert that the Superintendent departed from the stipulation and did not make findings respecting earned premiums, incurred losses and incurred expenses, nor base his findings upon such grounds as provided by the stipulation.

This would properly be a matter of proof on the final hearing. The proof, on the interlocutory injunction application, was that the superintendent did not make the findings provided by the stipulation, and did not base his conclusions on such findings (Affidavit of P. W. Terry, R. 88), and the verified bill also alleges that the rate order was made by the superintendent and justified by the courts of Missouri by adoption of a basis of premiums *received* as income and losses and expenses *paid* as outgo, (R. 5), which was a departure from the stipulation and squarely contrary to its provisions. The court below, in its opinion, states that the affidavit of P. W. Terry is to the effect that the superintendent did not make the findings provided in the stipulation. (R. 105). The Court confessedly resorts to an *opinion* of the Supreme Court of Missouri to meet this undisputed proof, (R. 105), not resorting to such opinion as to the law or its construction, for which prupose the Court might properly have referred to it, but for supposed facts. The uncontradicted state of evidence on the interlocutory injunction hearing was that the superintendent did not comply with the stipulation and therefore it was not binding. The court below, in order to find ground to defeat the plaintiff on its application, resorted to the opinion of the Supreme Court of Missouri, as indicating that the superintendent did make such findings. (R. 105). In so doing the Court came to conclusions of fact contrary to the undisputed record, and came to a false conclusion. The Court finds however, that it will not leave this matter for determination upon the final hearing, because the Court says:

> "This action is unnecessary because the undisputed evidence is that such deficiency, if it existed, was waived by the companies." (R. 105).

The Court says that after knowledge that the superintendent had not complied with the stipulation, the plaintiff had a right "to repudiate the stipulation and freely take such action as they desired." (R. 105). This we assert, is just what the plaintiff did.

The ground of the decision below, is that even if the superintendent did not make the findings or ground his order upon the basis provided in the stipulation and declined to abide by it, nevertheless the plaintiff and other companies in the same position are estopped, because:

(*a*) They initiated the statutory review proceedings;

(*b*) In the review proceeding, they omitted any attack upon the validity of the statute, or the legality of the proceeding before the Superintendent;

(*c*) They gave bond of indemnity in the review proceeding;

(*d*) They collected the premiums at the old rate. (R. 105).

For these reasons the Court says the compliance by the superintendent has been waived. Taking these grounds in the order stated, we assert that no one of these proceedings was pursuant to the stipulation:

(*a*) The statutory review proceeding was a proceeding of right expressly provided for by the Missouri Statute (Sec. 6284, Mo. Revised Statutes 1919). It was therefore not pursuant to or dependent on any stipulation;

(*b*) There is no evidence in the record that the plaintiff omitted any attack upon the validity of the statute or the legality of the proceeding before the Superintendent. Neither the transcript nor pleadings in the State court appear in the record. If the course adopted by the court below, of resorting to the opinions of the courts for facts be followed, then we may state that examination of the opinion of the Supreme Court of the United States in the case of *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, discloses that the unconstitutionality and invalidity of

the statute and the rate order were presented, but the court held that they could not be properly raised in an aggregate proceeding provided by the statute, but only in a case brought by individual companies, alleging infringement of their individual constitutional rights. The record in this case does not contradict this statement;

(*c*) The record discloses that bond was given "upon the order and requirment of the court" in the review proceeding, and that a supplemental bond was given by the plaintiff and other companies, parties to such aggregate proceeding, which was "executed pursuant to the requirement of the court." Such bonds were in the amount of $500,000, each with surety. (See paragraph 6, Bill of complaint, R. 7). There is not a scintilla of evidence that any bonds which were given were "*pursuant to the stipulation*" or otherwise than by requirement of the court.

(*d*) The fourth ground asserted by the court below as showing a waiver is that plaintiff "collected the premiums stipulated." Such action likewise was not pursuant to any right created by the stipulation or recognition of the stipulation as binding. We have elsewhere pointed out that such action does not give rise to an estoppel in any event. The premiums collected were collected because the power existed in the plaintiff to collect such premiums regardless of any stipulation, as the Supreme Court of Missouri has expressly held in the case of *State ex rel Hyde* v. *Westhues,* 290 S. W. 443, 316 Mo. 457. The court in that case says concerning the same stipulation: "That agreement, as we have endeavored to show, did not attempt to fix 'the status of insurance rates'."

The court below treats the order of the superintendent as an act of making of insurance rates, whereas the Supreme Court of Missouri holds to the contrary and says:

"*The making of insurance rates is left with the insurance companies* or the actuarial bureaus of which they are members. The Superintendent of Insurance is given no authority to prescribe or regulate rates. The only power which the statute purports to confer upon him is

to veto the raising of rates or to order a reduction of rates, if upon investigation * * *" etc. "with respect to such a reduction order the statute contains no specific provisions for its enforcement. The insurance companies are not commanded to make their public rating records conform to it. They are not, in terms at least, prohibited from thereafter charging rates in excess of those fixed by the order. Nor is there any express provision making it unlawful to charge and collect the rates as they stood prior to the making of the order." *State ex rel Hyde* v. *Westhues,* 316 Mo. 457.

Under the facts in the record and the statutes as construed by the courts of Missouri, there was no act performed by the appellant, or omitted by it, which could at this stage of the litigation be said to be "pursuant to" the stipulation. If these matters are in any wise in doubt (and we think they are clear in favor of the appellant), such doubts should be resolved against irreparable injury to the plaintiff. No court should upon an inadequate and superficial investigation of the facts, such as lies within the scope of proof on an *ad interim* motion, take action clearly productive of confiscation, when no harm can come to the other party to the suit if the *status quo* be maintained (exacting property security).

XII.

The condition imposed for consideration of the application for injunction,—namely return of 10% of all premiums collected from November 15th, 1922, to date,—is arbitrary and an abuse of discretion.

The Court denied the interlocutory injunction, and in denying it made the order "without prejudice to any plaintiff to renew such application upon showing that it has repaid the excess of ten percentum collected on premiums * * * *since November 15th,* 1922, and up to the date of the renewal

of such application." (R. 59). This language of the order, coupled with the Court's opinion, therefore leaves the option with the plaintiff to renew its application on condition. This condition, which is also the essential ingredient in the denial of the present application for an interlocutory injunction, is a requirement for refunding *from November* 15, 1922, to date. But the rate order was not to be applied until February 1, 1928. The Court has imposed an unlawful and unreasonable burden on the plaintiff which it sets up as a bar to securing the interlocutory injunction to which appellant is entitled. It is provided in the statute that the superintendent, in making an order of reduction of rates, "shall *designate the class or classes* to which the reduction shall be applied if the companies do not within thirty days from the order of reduction submit a class or classes which meet his approval." (Rev. St. Mo. 1919; Sec. 6283).

Following this direction of the statute, and not any stipulation, the superintendent *in his rate order* provided that:

> "If the companies do not within 30 days from this order of reduction submit a class or classes which meets the approval of the Superintendent of Insurance, *the Superintendent will designate* the class or classes to which the reduction shall apply." (R. 5).

It should be noted that the superintendent in making his order followed the statute and not the stipulation. The plaintiff and other insurance companies made no designation of classes to which the reduction should apply, whereupon the superintendent of insurance, *on February* 1, 1928, and not before, designated the classes to which such order should apply. (R. 8, par. 8). The court below, in its opinion, held that under the statute such designation of classes was essential to make the rate order a complete and obligatory order. (R. 129). It therefore held that companies not party to the stipulation, did not have their rates reduced until February 1, 1928. As to the plaintiff, however, and other

insurance companies parties to the stipulation, the Court holds that the rates made by them stand reduced as of November 15, 1922. (R. 59). The reasons which impelled the Court to take so unusual a position were stated by the Court after their attention was called to the matter by counsel upon the rendition of the principal opinion. The Court thereafter filed an addendum to the opinion. (R. 128). The Court in this memorandum says that the rate order may by direction of the statute, be made effective:

(*a*) By designation by companies within thirty days after the rate order was in force; or,

(*b*) Upon their failure to act, by designation of the Superintendent thereafter to be made.

The opinion says:

> "It is thus clear that an order of reduction is not fully in force until such designation is made in one of the above ways. Here no such designation has ever been suggested by the companies and the Superintendent did not make such until February 1st, 1928, when he made the rate applicable to all classes." (R. 129).

In stating why such was the law as to companies not parties to the stipulation, but not in the case of the appellant, the Court says:

> "The stipulation amounted to a designation in advance so far as the parties thereto were concerned." (R. 129).

The Court further says that the companies made a designation of classes further by instituting a review proceeding, as,

> "no review could be had under Section 6287 (sic) until the order was binding. The parties pursued the remedy given by that section."

Therefore the court below says:

> "Such plaintiffs cannot now take a directly opposite position. They are estopped to deny that the order was not in effect as to them from the effective date (Novem-

ber 15th, 1922) provided in the order itself. The plaintiff herein which were not parties to the stipulation are in a better position. They can require an absolute compliance with the statute. As to them the order did not become effective until February 1st, 1928." (R. 129-130).

The result of the position of the court below, therefore, is that a policyholder taking policies in various companies in the year 1927, upon the same property, would have differing rates, being entitled to a refund from companies parties to the stipulation, but not entitled to a refund from other insurers insuring identical property under identical charges specified in the standard policies. The Missouri statute contemplates uniformity of rates of all companies in the state. Therefore, this view if adopted, means that contrary to the intent of the statute, the superintendent and certain insurance companies could create rates on identical property for identical service differing in the case of some companies from rates, exacted by other companies. In this the Court was clearly in error, because:

(*a*) The Superintendent did not follow the stipulation in making a rate order, the stipulation providing that the future rate order *when made* should provide that it apply to all classes. On the contrary the Superintendent followed the statute, stating that all companies, in the State, should have the privilege within thirty days of designating a class or classes, upon failure of which *he would in the future make such designation.* Neither during such thirty days, nor thereafter, did he seek to make a designation as of the date of his rate order.

Quite to the contrary, he made no designation of any kind until February 1, 1928, when he made the designation as of that date of all classes. He did not follow the stipulation in his rate order nor his designation of classes but followed the statute. The Court therefore, holds that the Superintendent might pursue the statute regardless of the stipulation, but the insurance companies, parties to the stipulation, were

bound by it. The superintendent did not in his order, differentiate between different companies in the State, but made an order applicable to all companies doing business in the State. What we have said before clearly indicates that an agreement made before the making of a rate order as to what the superintendent should do and to what classes he should make a rate order applicable, was a nullity and binding on no one and was so treated by the superintendent. If there was any rate order in force in Missouri at all, it is a rate order which was carried to completion on February 1, 1928, up to which time no company was bound to file any schedule of reduced rates because the superintendent had made no direction or designation for doing so.

The designation of classes to which a rate order should apply is not an empty formality. Until there was a designation of classes no one could possibly tell what the scope of the rate order was, or whether on a specified policy there was or was not a reduction in rates.

The Court should not be misled by the language of the rate order providing for a reduction of ten per cent upon the rates charged upon fire, lightning, hail and windstorm insurance. This provision was merely one whereby the amount of the reduction to be fixed in the aggregate was was determined and stated. It still remained to apply it by applying a specified change in the base rate upon apartment buildings, still another upon mercantile buildings and still another on public buildings, etc., etc. There might be a reduction upon cotton gins which might be equivalent to fifteen per cent upon that class; no reduction whatever upon farm risks; a reduction of seventeen per cent upon grain elevators, etc., by such process accomplishing the pre-determined reduction in the aggregate.

The detail of this matter as set forth in the affidavits (R. 90) indicates that no insurance company could know after date of the rate order and prior to February 1, 1928,

what the rate of premium would be upon any specified insurable property, and therefore, they continued charging the old rates because new rates were not effective and could not be applied until the application of the superintendent was directed February 1, 1928. (R. 90.)

The terms imposed by the Court for permitting an interlocutory injunction application being prohibitive and being clearly inconsistent with the directions of the Missouri statute and the rate order made by the superintendent, and imposing a much greater burden, the directions of this Court should go to the court below, that no requirement for refund or security should be made covering any date earlier than February 1, 1928.

The Court is completely in error in holding that "no review could be had under Section 6283 (6284) until the order was binding." The statute is not limited to completed rate orders having elements of finality, but the statute is that "the *orders* and *directions* of the superintendent of insurance, together with his *findings* or *determinations* of facts upon which such order or determinations are founded, shall be reviewable by proper action in the courts." (Sec. 6284 Revised Statutes of Mo., 1919). The mere finding that rates were unreasonably high, is the subject of review. The determination of the facts as to income and outgo were subject to review whether the matter had reached the point of a completed rate order having finality or not. There being a right to review his findings and determination of fact, as well as his orders and directions, there was every right to review the matter whether it had reached the point of requiring reduction of rates or not.

If this view of the matter were in error, and it was a premature review before the order had reached the point of completion, this could only be creative of a dismissal of the review proceedings because prematurely taken, but could not possibly be creative of an estoppel. In other words, if the Court now finds that the order was not an effective

order requiring reduction of rates when it was made and did not become so until February 1, 1928, the order of the superintendent could not acquire characteristics of finality by the later action of aggrieved parties in appealing from it prematurely. The order of the superintendent could neither be enlarged nor diminished by any action taken by the insurance companies *after it was made*. It was in itself, either final or interlocutory as made. It retains those same characteristics regardless of the action of the parties affected by the order. Its nature as to finality must be determined from the order itself and not from the subsequent action of those affected by it.

If the case at bar should proceed to final hearing, it would appear that the parties reviewing the rate order were not in identity with the parties signing the stipulation. In the *interim* some companies ceased doing business in the state and others entered into business in the state. The stipulation was signed by the companies in the state at that time; the review proceeding was brought by the parties who were in the state a year later when that proceeding was instituted. The Court's assumption upon motion for interlocutory injunction of a complete identity of parties in the stipulation and in the review proceedings is false in fact, has no promise in any evidence before the Court, and is no more than a mere assumption upon the part of the Court and contrary to fact.

We respectfully submit that the order appealed from should be reversed and issuance of interlocutory injunction as prayed in the bill should be directed.

Robert J. Folonie,
John S. Leahy,
William S Hogsett,
Ashley Cockrill,
Counsel for Appellant.

FILE COPY

No. 104

NOV 23 19
CHARLES ELMORE
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
Appellant.

vs.

JOSEPH B. THOMPSON, Superintendent of the Insurance Department of the State of Missouri and STRATTON SHARTEL, Attorney General of the State of Missouri,
Appellee.

Appeal from the District Court of the United States for the Western District of Missouri.

REPLY BRIEF FOR APPELLANT.

ROBERT J. FOLONIE,
JOHN S. LEAHY,
WILLIAM S. HOGSETT,
ASHLEY COCKRILL,
COUNSEL FOR APPELLANT.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

INDEX.

	PAGE
Reply to appellee's statement of facts	1
Confiscation	3
Other uncontroverted points	4
Earned and incurred basis	5
Waiver and estoppel	5
"Clean hands" doctrine	6
Restitution	7
Mutuality in stipulation	12
Waiver in advance of constitutional rights	12
Authority of attorneys	12
Equal protection	13
Police power, scope	13
Reservation of important issues to final hearing	13
Effective date of rate order	14
Moot case	16
Res adjudicata	21

Alphabetical Table of Cases.

Aetna Ins. Co. v. Hyde, 275 U. S. 440	16, 23, 27, 38
Aetna Ins. Co. v. Travis, 124 Kans. 350	26
Ash Sheep Co. v. U. S., 252 U. S. 159	29
Banton v. Belt Line R'y. Co., 268 U. S. 413	19
Bilsland Ex'r. v. McManomy, 82 Ind. 139	25
Buck v. Kuykendall, 267 U. S. 307	29
Bierce v. Hutchins, 205 U. S. 340	32
Cummings v. Mugge, 94 Ill. 186	9

PAGE

34 Corp. Jur., 915 24

Clifton v. Meuser, 88 Kans. 408, 129 Pac. 159, 43 L. R. A. (N. S.) 124 24

Detroit & Mackinac R'y. Co. v. Mich. R. R. Comm., 235 U. S. 402 30

DeSollar v. Hanscome, 158 U. S. 216 31

Fordham v. Hicks, 240 Fed. Rep. 751 36

German Alliance Ins. Co. v. Lewis, 233 U. S. 339 13

Groesbeck v. Duluth, So. Shore & Atl. Ry. Co., 250 U. S. 607 20

Glenn v. Priest, 48 Fed. Rep. 19 21

Harrison v. Remington Paper Co., 72 C. C. A. 405, 140 Fed. Rep. 385; 5 A. & E. Ann. Cas. 314; 3 L. R. A. (N. S.) 954 21

Missouri Rate Cases, 230 U. S. 474 27

Northern Pac. R. R. Co. v. North Dakota, 236 U. S. 585 27

Newburyport Water Co. v. City, 85 Fed. Rep. 723 34

National Surety Co. v. Jenkins, 18 Fed. (2d) 707 36

Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287 39

Russell v. Place, 94 U. S. 606 31

State, ex rel. Waterworth v. Harty, 278 Mo. 694 29

Southern Pac. Co. v. Bogert, 250 U. S. 483 30

Tyson & Bros. v. Banton, 273 U. S. 418 13

Troxell v. Delaware L. & W. R. R. Co., 227 U. S. 434 33

U. S. v. Bliss, 172 U. S. 321 21

Van Wert Gaslight Co. v. Public Util. Comm. of Ohio, 299 Fed. Rep. 670 40

Williams v. Williams, 265 Ill. 64 21

Water Light & Gas Co. v. Hutchinson, 160 Fed. Rep. 41; 19 L. R. A. (N. S.) 219 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 104.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
Appellant,

vs.

JOSEPH B. THOMPSON, Superintendent of Insurance Department of the State of Missouri and STRATTON SHARTEL, Attorney General of the State of Missouri,
Appellees,

Appeal from the District Court of the United States for the Western District of Missouri.

REPLY BRIEF FOR APPELLANT.

Reply to appellees' statement of facts.

Appellees, in their brief, have virtually conceded the case of the appellant. In effect they abandon the grounds asserted by the court below in its opinion as the basis for the decision. Appellees assert new and different supposed grounds for sustaining the Court's order. The trial Court did not deny an interlocutory injunction, upon the theory that the appellant had failed to make a case because it presented it upon the earned and incurred basis; but, to the contrary, granted interlocutory injunctions, upon identical bills, to other complaining insurance companies (Rec. 127, 128). The court below, while criticising such basis, did not predicate its denial of relief thereon, but grounded such action on its part solely upon the basis that appellant was a party to the stipulation, which the

Court held barred relief (Rec. 59). We have pointed this out specifically in the brief for appellant. (Appellant's Brief 7.)

Appellees, recognizing that the stipulation furnishes no bar to an interlocutory injunction, assert other grounds why the injunctions might properly have been denied, and says:

> "A three-judge court was assembled and it denied a temporary injunction to appellant and 113 other companies on three grounds, although the opinion might be said to have finally rested on the one ground." (Brief for Appellees 2.)

We do not exactly understand how an order denying an injunction could be made "on three grounds" and, at the same time, be said "to have finally rested on one ground." The three grounds which appellees assert (but which were not the predicate of the opinion below other than the point as to stipulation) are:

(*a*) Failure to make "restitution."

(*b*) *Res adjudicata.*

(*c*) Failure to show confiscation, because experience is stated upon earned and incurred basis and not upon the basis contended for by appellees. (Brief of Appellees 2.)

The court below did not base its action upon *res adjudicata* and that issue was not properly involved in the court below, nor is it a ground for barring relief either mentioned in the opinion or arising on the record, as we shall point out in later argument.

The argument by appellees that confiscation was not proven because income and outgo were not completely disclosed is only another way of asserting that the earned and incurred basis for which appellant contends (Appellant's Brief, Point II, pp. 16, 29) is unsound.

Appellees have not, in their brief, followed the order of points as made by appellant, and in this reply we are therefore compelled to chose between the order on which points

are presented in the brief of the appellant and the order in which they are presented in the brief of the appellees. We shall, for convenience, adopt the former.

I.

Confiscation.

(Appellant's Brief 24.)

The first point made by appellant (Appellant's Brief 24) discloses the income and outgo of the appellant over a period of years; discloses, also, that other insurance companies doing business in Missouri had a like result, and that the plaintiff, and such other companies in the aggregate, having done business for eleven years past with no profit whatever. By application of the rate order, their losses would be increased still further.

The appellees do not answer or purport to answer this point or the cases cited under it, (except as the impropriety of the earned and incurred basis of calculation is the subject of attack). The earned premium argument appears in appellant's brief, Point II (Appellant's Brief 29). The argument of appellees on the earned premium basis (Appellee's Point III) being applicable to a different point raised by appellant, will not be further noted under this point. It is therefore an uncontroverted fact herein that appellant had outgo in excess of its income for eleven years prior to the commencement of its suit. The prescribed rate permitted no return, above outgo, to the operator of the business; and cases were cited by appellant to the effect that this is confiscatory—appellee does not controvert our contention. (Appellant's Brief 25, 26.)

I-a.

Other uncontroverted points.

Other points made in appellant's brief, which are in no way argued or controverted in the appellees' brief and, therefore, are undisputed upon the record, are the following:

(*a*) The statute, under which the rate order was made, made no provision for notice or hearing. (Appellant's Brief 27.)

(*b*) The order is an unwarrantable invasion of the right of appellant to manage its own business. (Appellant's Brief 27.)

(*c*) The statute is void, in that it is made to apply to stock fire insurance companies, expressly exempting other insurers similarly situated and doing a like business. (Appellant's Brief 68.)

(*d*) The court below found that the method employed by the superintendent was unjustifiable in the basis employed by him, in that he arbitrarily rejected outgo from consideration, which was properly to be taken into account. Such arbitrary basis makes the rate order a nullity. (Appellant's Brief 28.)

(*e*) The superintendent erroneously included interest on investments as an item of income and his action in doing so was held by the court below to be arbitrary; wherefore an interlocutory injunction should have been granted, because his rate order was a nullity because of such arbitrary action. (Appellant's Brief 28.)

(*f*) The superintendent's order was made upon the consideration of aggregate experience only of all companies in the state, rejecting from all consideration the individual experience of the plaintiff and its confiscatory effect upon the plaintiff. This was arbitrary and confiscatory action invalidating the rate order and was not the subject of consideration in the aggregate rate hearing. (Appellant's Brief 28, 29.)

II.

Propriety of earned and incurred basis.
(Appellant's Brief 29.)

The appellees discuss this subject under Point II of appellees' brief (Appellees' Brief 6, 52). We have already presented this point under our original brief, Point II (Appellant's Brief 29) and shall not elaborate it here. We believe the matter should more properly have been reserved for the final hearing of the case when the evidence would be before the Court, as it is a mixed subject of law and fact. But if the matter were one to be determined as a strictly legal proposition, independent of evidence, it could not, upon a fair consideration, be decided against the appellant.

The caption of the appellees' Point III is misleading, wherein it is said that "the District Court held that all of the petitions for temporary injunction should be dismissed * * *," etc., because of employment of the earned and incurred basis. We have already pointed out in our original brief (p. 30) that the Court did not decide the case on that point and, to the contrary, in those cases where a stipulation was not involved, granted interlocutory injunctions, although the experience was therein set forth on the earned basis.

III.

The superintendent violated the stipulation whereby appellant was relieved from obligations which could give rise to an estoppel.

(Appellant's Brief 37.)

The appellees have not argued or presented anything in answer to this point which we regard as conclusive of the error of the court below. It therefore stands conceded that

the superintendent refused to abide by the stipulation. He was to make a rate order based upon findings of fact, as respects the earned and incurred basis. He made no such findings and did not base his order on such findings, as it was stipulated he would do. (Appellant's Brief 38.)

It not only stands conceded but by the uncontradicted proof in the case it was shown that the superintendent abandoned and declined to abide by the stipulation (Appellant's Brief 39). This conceded point is of itself sufficient to cause a reversal of the order of the court below.

IV.

Appellant is not precluded from relief because of waiver or estoppel.

(Appellant's Brief 40.)

Under this point the appellant cited cases and presented argument to the effect that none of the actions attributable to it were pursuant to the stipulation but were pursuant to independent right and, therefore, could not be creative of an estoppel. The appellees have made no answer to this argument and therefore are in the position of conceding the correctness of our position upon the record.

V.

Appellant did not by the stipulation agree to repay money to policyholders and therefore the doctrine of clean hands is not soundly applied to bar relief.

(Appellant's Brief 44.)

Appellees seek to meet this argument under Point II of appellees' brief (Appellees' Brief 5, 25). The appellees repeatedly state in this point that appellant "had stipulated to make restitution" (Appellees' Brief 28), but there is nothing in the record to bear out the assertion, for there was no

stipulation so providing. What appellant stipulated to do was to furnish bonds, and they were furnished. Appellees, apparently, do not regard their own argument (that appellant had *stipulated* to make restitution) as having much force. They seem, rather, to base their argument on the proposition that "*regardless of* the stipulation it was the duty of appellant to refund all excess premiums collected under an order of the court, which was later set aside." (Appellees' Brief 28.)

There *was no order* of a court under power of which excess premiums were collected, nor was there any such order which was "later set aside." The record is devoid of anything to disclose such supposed facts.

Appellees state, "It was admitted by these insurance companies that they wrongfully retained this money due the policyholders" (Appellees' Brief 29). The appellant has never made such an admission, and there is none in the record.

Appellees cite many cases like that at the top of page 30 of appellees' brief, where a wrongdoer "*confesses* to have obtained from the Government by means of a fraudulent scheme," etc. The present situation bears no similarity to such cases. Even a superficial examination of appellees' cases will disclose that none of them is like the case at bar. Whether appellant is or is not entitled to retain the increase is the subject of litigation in this suit. It is not a case where it is *conceded* that the increase belongs to the other party to the litigation.

"Restitution"

In Point II of appellees' brief (Appellees' Brief 25), the appellees treat of the subject of coming into equity with clean hands and "*restitution.*"

The position of appellees is set out at page 26 of their brief, as follows:

> "The District Court held that it could not grant a temporary injunction because of the failure of *all* of these

> insurance companies to comply with their stipulation and make restitution. It is unconscionable and unthinkable that these same companies can *again litigate* this *same question* and keep all of these excess premiums which they *wrongfully* collected under an order of the court which has since been set aside. The rule is universal throughout America that where one receives something from another *under an order of the court* and later that order is set aside, restitution must be made of all that was received *under such order.*" (Italics are ours.)

The cases cited by appellees are all supposed to bear upon the propositions so asserted. The principal defects in the position of appellees exist in the following:

The District Court did not find "failure of all these insurance companies," for it granted injunctions to forty of the insurance companies bringing suit.

There is no basis for holding, and the court below did not place its decision, upon the ground of *res adjudicata,* nor hold that appellant was debarred from "again" litigating, nor did it hold that this case presents "this same question."

It does not appear that the sums collected by appellant were "wrongfully collected." To the contrary the Court granted injunctions to some insurance companies collecting amounts under identical circumstances and the question whether the collection is *wrongful* is the very point for ultimate determination upon the final hearing of the case.

The collections made by appellant were not "collected under an order of the court" but were collected by the inherent right of appellant to collect pre-existing rates, no lawful order of an authorized authority having superseded its power and the courts of Missouri having specifically held that the power to collect the former rates existed despite the rate order, as we have noted on page 42 and 43 of appellant's original brief. There having been no order of court under which collection was made, there necessarily has been no such order of court "which has since been set aside." Orders

of the court in the former proceeding in the state courts, as respects collection of excess premiums, are not set forth in the bill (which is the only pleading now in the case), nor in any of the evidence produced on the hearing of the interlocutory injunction. Both court and counsel are, under proper observance of the rules of law, bound to get their facts from pleadings or evidence. As they contain nothing to support the assertion made by appellees, there is nothing upon which the court below had power to act in defeat of the application for interlocutory injunction.

We have no quarrel whatever with the principle of the cases of the tenor of that appearing on page 29 of appellees' brief that "where plaintiff *admits* a sum of money to be due or equitably owing to defendant, his petition must show that he has paid or offered to pay, or must contain an averment of his willingness to pay such sum of money, to entitle him to relief by injunction."

The appellant does not, and never has admitted that any sum of money is due to the defendants or to policy holders, or that legally or equitably it owes anything to any one, but to the contrary, insists that it would be inequitable and confiscatory if it were required to return any monies. It asks the aid of the Court to prevent such injustice. The cases cited therefore, are not even remotely in support of the action of the court below in denying interlocutory injunction to appellant.

We can see no analogy in the present situation whatever with cases such as those appearing on page 44 of appellees' brief, that where a plaintiff, for example, secures a judgment and collects the amount of it from the defendant by execution and the case is thereafter reversed on appeal, that the Appellate Court should make an order that the plaintiff restore what he has collected. Such rule is elementary, but has no bearing on the present situation.

It appears to us that the case of *Cummings* v. *Mugge*, 94 Ill. 186, cited by appellees at page 43 of their brief, which

appellees state to be "a splendid opinion" is authority for the appellant and not for the appellees.

In that case, as appears from the quotation set out by appellees herein, the appellant in that case, who was defendant to an injunction proceeding, was restrained by injunction from meddling with the property which was in fact his own. The appellee, (the moving party in the injunction proceeding), wrongfully took possession of the property and disposed of the same, to his own use. The appellant asserted that he was entitled to have restitution of the value of the lumber, of which he was deprived, and his expenses included in the assessment of damages. The Court as quoted by appellee says:

> "*This position cannot be sustained.* The service of the writ of injunction in no way authorized or caused the wrongful act of appellee in taking and converting the property."

The present situation is analogous. The position of our opponents cannot be sustained because the review proceedings "in no way authorized or caused" the acts of the plaintiff in the case at bar, in exacting the premiums it did exact, but the acts of this appellant were independent of the Court proceedings. In fact, by the statute of Missouri as it existed at that time, the Court was not authorized to make any order authorizing or empowering the appellant to collect the former rates, but the statute specifically forbade that Court from making such order. The provisions of such statute will be found at the top of page 57 of appellant's original brief.

The appellees, under their brief, are committed to the theory that restitution is owing from the appellant to some one because (*a*) it received "something from another under an order of court"; (*b*) that such court order was later set aside; (*c*) that the court below proceeded on a similar assumption. (Appellees' Brief 26.) The theory is unfounded because:

(*a*) If there was any order of the state court in the review proceeding, authorizing collection of any amounts by appellant, such order is not in this record.

(*b*) If there was any order in the state court, its terms and conditions are not in the pleadings or proof in this record.

(*c*) If such an order were offered or presented, the appellant would be entitled to make objection to it and have its objections ruled upon, and it might well be that such objections ought to be sustained against such an offer because of want of power of the state court under the statute to make any order on the subject.

(*d*) If no order was made in the state court, or one was made which was without authority or jurisdictional power in the court to make it, then the appellant would be in the position of having *rightfully* collected premiums which it was either entitled to retain, because the rate order, was a nullity, *or* the appellant *wrongfully* exacted such sums in contravention of a lawful binding rate order.

The question whether the exaction was a lawful or unlawful exaction, is the ultimate issue in this case and the court below should not have decided that ultimate question upon mere conjecture or speculation that there was an order and what the terms of it were.

Appellant having shown at least *prima facie* that the rate order was a nullity, (and therefore that the old rates were in force and its exactions from the insuring public were lawful) should be protected in the possession of this fund upon exaction of proper security, and the issue as to its right to retain or duty to refund the money determined after a hearing of the case.

Appellant has presented argument and cases to the effect that the stipulation could not bind either the plaintiff or the defendant in litigation subsequent to review proceedings

and that it was not the intention on signing the stipulation that it should do so. (Appellant's Brief 48, 50.) Appellees have not sought to controvert the proposition so supported by authority and therefore stand confessing that the stipulation, on which alone the court below denied relief, is a nullity as applied to this case.

VI.

Stipulation lacking in mutuality.
(Appellant's Brief 55.)

The appellees have not even mentioned this point under any point of argument made by appellees.

VII.

If the stipulation be construed as a waiver in advance of infringement of constitutional guarantees thereafter accruing, it is a nullity. Appellant was under duress.
(Appellant's Brief 56.)

Appellant presented this under Point VII and the argument supported by cases covers eight pages. The appellees do not even mention this point in their brief.

VIII.

The attorneys representing stock companies en masse in an aggregate proceeding could not bind individual insurance companies so as to bar complaint of individual infringement of constitutional right thereafter accruing.
(Appellant's Brief 64.)

The appellees make no reply to this point, except very casually in connection with its argument of the point of *res adjudicata,* (which will be noted in a later subdivision of this reply).

IX.

Denial of equal protection.
(Appellant's Brief 68.)

This point is specifically made and cases cited to the effect that the statute is invalid because identical insurance is written by competitive companies exempted from the rate law and the rate order. Appellees in no way mention this point in their brief.

X.

Scope of police power.
(Appellant's Brief, 68.)

Under this point appellant presents arguments to show the grave doubt that the scope of *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 339, should be extended so far as would be necessary to support the rate order in this case. We call attention now to the fact that in our original brief (Appellant's Brief 69), in the citation of the case of *Tyson & Bros.* v. *Banton*, that case is erroneously referred to as reported in 271 U. S. 418, whereas it is, in fact, reported 273 U. S. 418.

XI.

The matters involved are or such importance that they should have been reserved to final hearing and the rights of the parties protected by interlocutory injunction.
(Appellant's Brief 76.)

This point seriously urged upon the Court is not even mentioned by appellees in their brief.

XII.

The condition imposed for return of ten per cent of all premiums from November 15, 1922 to date is arbitrary, as the rate order was only effective from February 1, 1928.
(Appellant's Brief 80.)

This controlling point, which alone is sufficient to cause a reversal of the case, is ignored by appellees in their brief. We find mention of this matter in only on place in appellees' brief, and that is under appellees' Point I (Appellees' Brief, Point I, 10), that the question presented is a moot question. Such discussion appears in appellees' brief at page 20, at the bottom of the page. It is there stated that the matter "was not fully presented because not thought important in that litigation." (Appellees' Brief 21.) We are not clear just what point appellees make on this, except their statement that "the matter was not fully presented." We do not know how it could have been more fully presented, for it is set forth amply in the bill of complaint, where it is set forth in great detail that the superintendent of insurance did not, within thirty days, or at any other time prior to February 1, 1928, make a designation of classes (Rec. 44); that the failure to make designation of classes until five years after the rate order, during which time great changes occurred, was such a lapse of time that his power to designate classes was ended (Rec. 45); that no hearing or investigation of any kind was had or any notice given to the plaintiff of such class designation. It is further alleged that the plaintiff never made any designation of classes as prescribed by statute and that without such designation of classes by either plaintiff or the superintendent the rate order was not effective. (Rec. 45.)

The court below did not treat this matter as one "not thought important," nor one which "was not fully pre-

sented," but wrote a separate opinion upon this point which it filed as an addendum to the opinion. (Rec. 128.) In that opinion the Court expresses its debt to counsel for impressing upon the Court the importance of this matter. The Court says that "the suggestion of counsel is well made," namely, the suggestion that this effective date is a matter of controlling importance. Without fixing an effective date, no refund would be possible, for a date must be fixed as the court below says: "to enable the parties to know the amount of refund necessary" (Rec. 129). The statute specifically provided that such designation *must be made* and the insurance companies have thirty days in which to make it if they choose. If they fail to do so the superintendent may make it after the lapse of thirty days. He did make such designation until February 1, 1928 (and as of that date, Rec. 89). The court below said that no such designation was made by the appellant "and the superintendent did not make such until February 1, 1928, when he made the rate applicable to all classes." (Rec. 129.) The Court holds that the rate order is effective only from February 1, 1928 as to companies not parties to the stipulation (Rec. 130), but as to appellant it selects a different date, casting a greater burden upon the appellant. The matter is of controlling importance in the case and cannot be slighted or overlooked, as appellees seek to have the Court do.

New propositions urged by appellees.

Appellees urge two propositions affirmatively:

(A) That this is a moot case;

(B) That the matter is *res adjudicata.*

As employment of divisional numberings used in the preceding briefs would only be confusing, we have adopted arbitrary numbers A and B for discussion of these points.

(A) The proposition that this is a moot case.

(Appellees' Brief, Point I, 10.)

This point made by appellees is so baseless and so completely unsupported in the record that the approach to its discussion presents difficulty. Before entering upon discussion of its detail, we wish to correct statements made under this point by appellees.

Appellees state that the appellant "has litigated the confiscatory effect of such reduction. The Supreme Court of Missouri held against them, and the Supreme Court of the United States held against them." (Appellees' Brief 10.)

There is nothing in the record to support such statement. The Supreme Court of the United States did not hold against appellant upon the issue of confiscation; but, having granted certiorari in the belief that the issue of confiscation existed in the case, dismissed the writ upon the ground that by the nature of the case the issue of confiscation, which was an individual one, could not be involved in a proceeding *en masse* by a group of companies testing aggregate experience of such companies in the state.

Aetna Insurance Company v. *Hyde*, 275 U. S. 440.

Appellees state that "the only relief asked in the District Court was a temporary injunction to restrain the officials of the state from putting this ten per cent reduction order into effect." (Appellees' Brief 10.) The prayer of the bill in fact is, that the rate reduction order in question be adjudged confiscatory and unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of the Constitution of Missouri, as a deprivation of property without due process of law and a denial of equal protection of the laws. (Rec. 34.) That the proposed action of the State authorities, by proceeding for penalties, fines, imprisonment and revocation of license, shall

be held in violation of the same constitutional guarantees. (Rec. 34.) That the defendants, the Insurance Superintendent and the Attorney General of Missouri and their deputies, agents, etc. be enjoined (*a*) from any action to enforce such rate order against the plaintiff and its agencies. (Rec. 34.)

This bill prays that an interlocutory injunction may issue to restrain prosecutions, actions for penalties, and to restrain interference with the plaintiff in collecting the former rates which but for the rate order would be collected. (Rec. 35-36.) That the defendants be enjoined from cancelling the license of the plaintiff or refusing to renew its license because of the fact it had collected such premiums. (Rec. 36.)

It will be noted that the bill seeks to enjoin prosecutions because of exaction of the premiums in the past, to restrain actions to recover the excess and to protect the plaintiff in collecting the former rates pending suit. The reasons why the point that the controversy is moot is a baseless contention may be stated briefly, as follows:

1. The supposed matters, stated to have created a moot condition, are not any part of the record herein and are not before the Court so as to warrant the Court in taking any action pursuant to such supposed representations. The matters of supposed facts (set forth on pp. 11-14 of Appellees' Brief) are not appropriate for consideration by this Court. We do not challenge the fact that there are cases in the books which were held under their facts to be moot cases. A perfect example of such a case is that cited by appellees at page 19 of their brief:

> "Thus, if the term of imprisonment expires pending an appeal by the jailor from a decision in a habeas corpus proceeding, releasing a prisoner from custody, the appeal will be dismissed."

This case has none of the attributes of a moot controversy such as are recited in the cases set forth by appellees.

2. Appellees still assert that "the reduction order was effective November 14, 1922." (Appellees' Brief 22.)

The supposed action of the appellant relied upon as disposing of the entire controversy between appellant and appellees is stated by appellees to have been a filing under protest and under duress (Appellees' Brief 11), and is a filing making a reduction as of February 1, 1928. (Appellees' Brief 12.) Appellant has collected an excess above the amount provided in the rate order since November 15, 1922. Under appellees' unsupported statement, in their brief appellant proposes to make a refund only since 1928. The excess collected from November 15, 1922, to February 1, 1928, is at issue. So is the future, even under appellees' statement.

Appellant asserts that the effective date of the rate order is February 1, 1928. But the appellees assert and claim that the acts of the appellant in collecting the former rate of premium from November 15, 1922, to February 1, 1928, was illegal and threaten to cancel the license of the appellant and subject it to prosecutions for collecting and retaining the old premium rate during such *interim*. Appellant is entitled to an interlocutory injunction to restrain cancellation of its license because of supposed failure to return premiums it is not bound to return.

The rate order was effective as to appellant either on February 1, 1928, or on November 15, 1922.

If it was effective on February 1, 1928, then appellant is entitled to an interlocutory and a permanent injunction, restraining the appellees from lawlessly cancelling its license because of exaction of lawful premiums (at preexisting rates) from November 15, 1922, to February 1, 1928. If such is the situation, then this is not a moot case.

If the effective date was November 1, 1922, then the question is presented whether appellant is or is not bound to make refund of premiums from such date to February 1, 1928, in the light of its objections to the rate order as confiscatory and violative of constitutional right. If that is the situation, appellant is likewise entitled to relief, and the case

is not moot. In no aspect of this case can it be said that there is not a genuine, contested suit.

3. If appellees' statements of supposed fact were all accepted as true appellant would be entitled to an injunction, as it appears that the acts of appellant said to make the action moot were made under duress of an unlawful rate order. Appellant, under appellees' statement, refrains from collecting the excess only during such period as it is without the protection of an injunction and to preserve its license and established business. It should have an interlocutory injunction, restraining interference for the future, so it may reinstate its old rate charges under the protection of the Court, with appropriate bonds or other indemnity to the insuring public.

4. In the case of *Banton* v. *Belt Line Railway Co.*, 268 U. S. 413, (erroneously cited by us heretofore as 236 U. S.), suit was commenced to enjoin enforcement of an order of a public service commission of New York. The issue was that of confiscation, and the decree found the order to be confiscatory. It is not the law that an insurance company, or any other interest subject to public regulation, forfeits its right to complain of confiscation from day to day, because under duress of an illegal order it conforms thereto in the *interim* before it is able to secure relief. As was said in the *Banton case*:

> "The continued enforcement of that rate would operate to take appellee's property without just compensation and compel it to suffer daily confiscation. Notwithstanding the matter was pending on rehearing, the appellee had the right to sue in the Federal court to enjoin the enforcement of the rate."

It was asserted in the *Banton case* that:

> "Appellants insist that the appellee voluntarily assumed the obligation to transfer passengers pursuant to the order of October 29, 1912, for two cents each, and having been incorporated and having acquired its property subsequent and subject to such order, it is not entitled to complain of the order as an infringement of any constitutional right."

This Court rejected the contention that because conformity had been made to the order in the past, that this prevented complaint of it, if it was, in fact, confiscatory.

The Court points out that the utility had no recourse except compliance, which was prescribed under penalties, as is the case here, and the Court says:

> "A rate that is just and reasonable when prescribed, subsequently may become too low, unreasonable and confiscatory." (Citing cases.)

The fact that compliance with an order was made under duress and under protest, as appellees say is the case here, does not preclude attack if confiscation in fact exists.

The Court in the *Banton case* said (p. 418):

> "That company did not agree to serve for the prescribed joint fare of five cents, and was not bound to do so if the rate was found to be, or if thereafter it should become, confiscatory. It did not surrender the protection of the Fourteenth Amendment."

The language quoted clearly means that the protection of the Fourteenth Amendment is not surrendered, by compliance with a reduced rate imposed by a commission, if the rate is in fact confiscatory, or thereafter becomes so. It being an inconfrovertible fact herein, that the rate prescribed is confiscatory, appellant is entitled to relief therefrom, and entitled an injunction restraining interference with its collection, even if the lesser rate has been collected under duress of the illegal order.

In *Groesbeck* v. *Duluth, South Shore & Atlantic Railway Co.*, 250 U. S. 607, the appeal was from a decree enjoining interference with a rate violative of the directions of a statute fixing minimum passenger railway rates. The Court in the case cited held that even though the statute were repealed under which the two cent rate was imposed, there remained the question of refund of moneys collected and held

over specified period of time and for this reason the case was not a moot case. (P. 609.) So, in the present case, there is nothing, even in the statement of appellees in its brief, disclosing that appellant has undertaken to, has promised, intends or will return the excess collected by it between November 15, 1922 and February 1, 1928, unless required so to do by some judgment or proceeding determining that it is not entitled to retain such moneys. Neither will the appellant refrain from collecting such excess in the future if it can secure protection from destruction of its business.

(B) Res adjudicata.

The appellees assert that the issues herein are adjudicated by former decision. The issue, *res adjudicata*, does not arise upon this record.

1. Former adjudication is neither proven nor pleaded by the defendant and the issue was therefore not before the court below, nor is it involved here. If such defense is not pleaded by answer it is not available.

U. S. v. *Bliss*, 172 U. S. 321.

Harrison v. *Remington Paper Co.*, 72 C. C. A. 405, 140 Fed. Rep. 385, 5 A. & E. Am. Cas. 314, 3 L. R. A. (N. S.) 954. (C. C. A. 8th Cir., per Sanborn, J.)

Williams v. *Williams*, 265 Ill. 64.

Glenn v. *Priest*, 48 Fed. Rep. 19. (Cir. Court E. Dist. Mo.)

The determination that there is or is not an identity of issues in the case brought before the court with some former proceeding, for the judgment to conform to due process must afford an opportunity to the party so to be debarred (under proper issues formed) to present proof disclosing the pleadings, evidence, and in some cases the arguments, to establish as a fact whether or not there was an identity of parties and

of issues making a former proceeding an adjudication. There is no allegation in the bill from which such conclusion can even inferentially be drawn, and the bill is the only pleading in the case. The pleadings in the former proceeding are not before the court; nor is the evidence nor any of the arguments in the former proceeding before the court; nor may the Court take judicial notice of the facts of the former proceeding as they may be set out in some printed opinion. The Court may take judicial notice of the opinions of the Court as declarations of the law, but not take judicial notice of any supposed recital of facts in them as precluding the litigant in a later proceeding. The court below did not decide against the appellant on the motion for an interlocutory injunction, on the ground of *res adjudicata*, nor could it do so because the issue was not before the Court for consideration.

Appellees concede that the opinion below does not proceed upon this ground (Appellees' Brief 63), but seeks to carry the thought that it was inferentially decided in the court below. Such is not the case, as the opinion in the court below will disclose. If the matter should proceed to proof, we anticipate that the proof would show that there was neither an identity of parties nor an identity of issues in the former proceeding in question. The appellees say, respecting the former proceeding, that:

> "The sole question in that case was whether or not the ten per cent reduction order of October 9, 1922 was confiscatory. The Supreme Court of Missouri held it was not and these companies cannot again litigate that question as to that past experience." (Appellees' Brief 65.)

There is not a scintilla of proof in the record to support such assertion nor any answer or equivalent pleading to support such evidence had it been offered.

Not only was the question of confiscation not the sole question in such former proceeding, but it was not involved in

that case at all. This Court granted certiorari to the Supreme Court of Missouri to review the aggregate proceeding brought *en masse* by companies in Missouri, to review a rate order also made *en masse*. No consideration of the individual experience or situation of this plaintiff was in issue. This Court dismissed the writ after hearing on the ground that by the nature of the proceeding the issue of confiscation could not arise and could not be involved. This Court held that confiscation is an issue which can be raised only by a single entity which is affected and that in an *en masse* proceeding the issue of confiscation does not and cannot arise. The sole question for consideration was aggregate experience and the effect upon the business of companies in the aggregate and not its effect upon the individual companies involved. It was upon these explicit grounds that this Court refused to consider the case.

Aetna Insurance Company v. *Hyde*, 275 U. S. 440.

We present the following argument out of an excess of precaution, insisting, however, that the issue of former adjudication is not presented upon the record so as to warrant this Court in weighing it at all.

The statute under which the review proceedings were had, and under which the rate order was made, provided for a consideration of aggregate experience of all insurance companies in the State only, and for a rate order applicable to them *en masse* on such aggregate consideration.

Rev. St. of Mo. 1919, Sec. 6283 (Appellees' Brief 2).
Rev. St. of Mo. 1919, Sec. 6284 (Appellant's Brief 57.)

One of the chief grounds of complaint made in the present bill is that the order is confiscatory *as to appellant*, which has done business in Missouri at a loss over a period of many years (Rec. 11), and it is alleged that "the individual experi-

ence of plaintiff was in no wise considered nor contemplated by said defendant Hyde" in his hearings and rate order. (Rec. 24.) Such former joint proceeding presents neither an identity of issues nor of parties with the present individual suit. No other conclusion is deducible from the opinion in *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440. The fact that the present suit grows out of the same subject matter is of no importance, for it is not the same case if it "involves a different question or claim in regard to it." 34 C. J. 915.

In *Clifton* v. *Meuser,* 88 Kans. 408, 129 Pac. 159, 43 L. R. A. (N. S.) 124, the Supreme Court of Kansas had before it a case, the facts wherein were as follows:

Sarah Potts sued Amanda Clifton for a sum of money. Amanda Clifton made the defense to such suit, that the money had been given her in consideration of an express promise to nurse and care for Mrs. Potts. The personal representative of Mrs. Potts recovered judgment in such case upon such issues. Thereafter, Mrs. Clifton filed a claim against the estate of Mrs. Potts for the reasonable value of her services in nursing and caring for Mrs. Potts, and the question was presented whether *res judicata* barred the case. The Court say that "the right of Mrs. Clifton to recover from the estate the reasonable value of her services to Mrs. Potts cannot be regarded as having been adjudicated in the first action." The Court further says:

> "A judgment which may have resulted from a determination of either one of two or more separate issues, does not constitute an adjudication as to either, where it is not shown upon which it *was, in fact, based.*"

It is further stated in the opinion, that:

> "*The issues in the two actions were not identical.* In the first, the question was whether an *express* agreement for the passing of the title to the money had been made and performed. In the second, the question was whether services had been rendered under such circumstances that the law *implied* a contract to pay their reasonable value."

It is further said that:

> "The same petition may include in separate counts a claim based upon an express contract to pay an agreed sum for services, and one based upon an implied contract to pay their reasonable value. *Barry* v. *Craig*, 76 Kans. 345. Each count states a complete cause of action. Proof in support of one is not admissible under the allegations of another. 9 Cyc. 349. The causes of action are not the same. They are distinct and different, although not wholly independent, being connected by this tie; there may not be a separate recovery upon each. It follows that a plaintiff who sues upon an express contract without adding a count upon a *quantum meruit*, waives nothing, and if defeated, is not thereby barred from maintaining a subsequent action upon an agreement arising by implication of law."

In *Bilsland, Executor,* v. *McManomy,* 82 Ind. 139, the action was one for injunction to enjoin the seizure and sale of property upon execution, in favor of Bilsland, Executor of Rawles. The ground of injunction was an asserted release of appellee from the judgment on which the execution issued. One of the defenses to the injunction suit was that of former adjudication. Rawles, in his lifetime, had recovered a judgment against appellee McManomy and one Robert Brown. After the death of Rawles, his Executor, Bilsland, had caused an execution to issue on said judgment and a bill for injunction had been filed wherein "McManomy and Brown together brought a suit against the same parties who were sued in this case, setting out as ground therefor the above writing made by David Rawles." (p. 142.) McManomy and Brown failed in their injunction suit and it is asserted that once having brought an injunction suit to enjoin the identical judgment, and the matter having gone to a decree, the same is *res judicata.* The Court says at page 144:

> "In respect to their last proposition, counsel insist that the appellee might have made his alleged parol agreement a cause for the injunction in the first action and that not having done so, he is precluded by the judgment in that action from seeking the same relief as in that cause in this action."

The Court, in holding that no adjudication exists by reason of such prior joint proceeding, says:

> "In the *joint* action of the appellee and Brown to enjoin the collection of the judgment, they could avail themselves only of joint causes of action or such causes as inured to the benefit of both, and neither of them could have pleaded or proved a separate release which was not available to the other."

The case above cited is indistinguishable in principle from the case at bar. In that case, a suit was brought by two judgment debtors, to enjoin an execution running against the two, upon the assertion that subsequent to judgment there had been a release of the two. They failed in that suit. Still later, one of the judgment debtors brought suit, asserting there had been a release of him, wherefore the judgment should be enjoined as to him, although to be left in force as to the other, a judgment debtor. It was held that the suit was not debarred by the former proceedings.

In the case at bar, it is asserted that there was a suit by all the insurance companies in the State of Missouri to nullify, in its entirety, a rate order affecting all companies in the State. This attack was unsuccessful. The present plaintiff brings a suit to nullify the rate order as to it individually, regardless of its enforcement against the other parties to the rate order. This upon ground that the same may not lawfully be enforced or made operative against it, the plaintiff, because to do so would, as to it, the plaintiff, be confiscatory. The principle underlying the situation is identical with that before the Supreme Court of Indiana in the case cited.

The theory of the Missouri rating statute is stated under somewhat similar circumstances in an insurance rate case in Kansas, in the case of

Aetna Ins. Co. v. *Travis,* 124 Kans. 350,

where it is said:

> "For the purpose of determining rates of premiums, plaintiffs must be considered as a whole, just as though collectively they constituted one company."

A review made by companies jointly, testing such a proceeding wherein they proceed as if they were one company, necessarily does warrant determination of the issue of confiscation, and such is the effect of the decision of this Court in *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440.

The question in the former proceeding was the validity of the rate order *per se* and not its *effect* upon application to the individual companies. As this Court said, in a case involving two cent passenger fare cases, in *Missouri Rate Cases,* 230 U. S. 474, 508, 509, wherein individual suits were brought by seventeen railroads and consolidated for hearing, and in which they were held valid as to twelve roads and confiscatory as to five:

> "The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and *each* complainant in order to succeed in assailing them must show that *as to it* the rates are confiscatory."

In the same way this Court has held rates compensatory as to one and confiscatory as to another, in the case of *Northern Pacific Railroad Co.* v. *North Dakota,* 236 U. S. 585.

In the review proceeding relied upon by appellees, evidence would not have been received as to the sound and prudent management of the National Fire Insurance Company or the experience of its officers, nor whether this appellant made or lost money in Missouri. The issue there was as to the aggregate experience of all companies doing business in the state even if some of them were poorly managed, or even grossly misconducted. The fact that the appellant, although well managed, prudently conducted, had lost money and would do so under the rate order, was a matter of no materiality to that case. The individual experience of this plaintiff is of controlling importance in this suit but was immaterial in the former proceedings.

In the case of *Water, Light & Gas Co.* v. *Hutchinson*, 160 Fed. 41, 19 L. R. A. (N. S.) 219, the Circuit Court of Appeals for the Eighth Circuit held that a judgment for the defendant in a suit upon an *express* contract for furnishing electric light to a city is no bar to a subsequent suit for the same service upon a *quantum meruit*. It is held that this constituted a different cause of action. When identity of actions is for consideration "the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined."

In discussing the subject of estoppel by former adjudication, the Court says:

> "It is the identity and the legal quality of the subject of the two actions, as well as the identity of parties, which create the estoppel. It may not depend so much upon the identity of the thing sued for, 'but rather from the one of identity in the *issues* involved in the two actions.'"

Quoting from Freeman on Judgments, Volume I, Section 259, the Court says:

> "If different proofs are required to sustain two actions a judgment in one of them is no bar to the other. If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to recover, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result."

It is further said in that case:

> "If there be any uncertainty as to whether the recovery had by the plaintiff in the former suit embraced the items of the account sued upon in the present action, resort may be had both to the record and extrinsic evidence showing the precise point involved and determined."

Even if the claim of confiscation had been asserted in the former proceeding, this would be a matter of no moment because it was not proper for consideration in that case.

As this Court said in *Ash Sheep Company* v. *United States*, 252 U. S. 159:

> "Rejection of a claim because pursued in an action in which it cannot be entertained, does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the court of appeals that a judgment is not conclusive of any question, which from the nature of the case, or the form of the action, could not have been adjudicated in the case in which it was rendered." (p. 170.)

Applying the language of the Court to the case here for consideration, we respectfully submit that it settles the issue of law now presented upon the bill of complaint in this case.

The Court further say:

> "A judgment is not conclusive of any question, which from the *nature of the case or the form of the action* could not be adjudicated in the case in which it was rendered."

The constitutionality of the rating statute of Missouri was not open to attack in the review proceeding, because in a proceeding under the statute its constitutionality cannot be assailed.

State, ex rel. Waterworth v. *Harty*, 278 Mo. 694.

The attempt in the review proceeding to overturn the rate order was an unsuccessful attack. One may not *in the same proceeding* both assail a statute and rely upon it. But the fact that one has unsuccessfullly undertaken to secure relief under the statute in a joint action is not a bar to an individual assault upon the statute and rate order in an independent proceeding. The appellant does not rely upon any provisions of the Missouri statute in its present attack upon the statute and rate order. The views expressed by this Court in

Buck v. *Kuykendall*, 267 U. S. 307,

are pertinent, where this Court said (p. 316):

> "But in the case at bar, Buck does not rely upon any provision of the statute assailed; and he has received no

benefit under it. He was willing, if permitted to use the highways, to comply with all the laws relating to common carriers. But the permission sought was denied. The case presents no element of estoppel."

The conglomerate attack on the rate order in its entirety in the former suit does not preclude an attack now upon the ground that although it may be valid as to others, it is invalid as to the plaintiff, because it is confiscatory as to the plaintiff. This wide divergence in the issues brings it within the principle of

Southern Pacific Co. v. *Bogert,* 250 U. S. 483,

wherein this Court says:

"Because of such wide divergence the earlier decrees do not operate as *res judicata.* And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis." Citing cases.

Appellees rely upon the case of *Detroit and Mackinac Ry. Co.* v. *Michigan R. R. Comm.,* 235 U. S. 402. The case bears no similarity to the present. In that case the election existed on the part of the railroad company to bring an individual review proceeding in the State court, attacking a rate as confiscatory, or to bring a suit in the Federal court, for injunction upon the same ground. It presented such issue in the State court in its judicial review, wherein it was the sole petitioner. The issue of confiscation was properly presented, considered and determined against the contention of the complaining party. Thereafter an injunction was afterward brought in the Federal court, seeking to relitigate the identical point.

The plaintiff in the case at bar has brought no previous suit complaining of the effect of the rate order as confiscatory. Nor was the review proceeding of such nature nor under the statute could it be. The only issue in that case

was aggregate experience of all companies in the State and not the confiscatory effect upon the plaintiff.

To establish a claim of *res adjudicata*, it is necessary to show a precise identity of issues, namely,

> "That the precise question was raised and determined in the former suit."
>
> *Russell* v. *Place*, 94 U. S. 606.

The bill in the case last cited was for an injunction for infringement of patent. It was contended that a previous judgment had been recovered by complainant against the defendant in an action at law for infringement of the patent, and that this operated as a bar. The Court said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the *precise question* was raised and determined in the former suit. *If there be any uncertainty* on this head in the record—as, for example: if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—*the whole subject-matter* of the action *will be at large, and open to a new contention*, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

In concluding the opinion, the Court says:

> "According to Coke, an estoppel must 'be certain to every intent,' and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." (Italics are ours.)

See also *De Sollar* v. *Hanscome*, 158 U. S. 216.

The claim of confiscation might well have been presented in the review proceeding and rejected by the Court considering that case because not pertinent to the inquiry there. The assertion of the claim of confiscation in the State court, had it been made, would have been no defense in such statutory proceeding if the rate order was justified by aggregate experience.

In the case of *Bierce* v. *Hutchins,* 205 U. S. 340, (opinion by Mr. Justice Holmes), suit was for replevin of certain property, and it was contended that the plaintiff could not assert title to the property because theretofore he had filed a claim of lien upon this property in the receivership action under which this property was held, and had brought a suit to enforce the lien. The Court holds that it is true that a person cannot be both the owner of property and also have a lien on it. But does it follow that when he filed his lien suit, he thereby made an election, which would defeat a later action for replevin if he were unsuccessful in his lien suit? On this point the Court says:

> "It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title. (*Van Winkle* v. *Crowell,* 146 U. S. 42), and therefore, *if a lien had been established* by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the *assertion* of a lien by one who has title, so long as it is only an assertion, and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one, because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election, but an hypothesis."

The Court sums up the whole matter as follows:

> "The fact that a party, through mistake, attempts to exercise a right to which he is not entitled, does not prevent his afterward exercising one which he had and still has, unless barred by the previous attempt."

The fact that the plaintiff, together with others, made a futile attack on the rate order upon the aggregate basis and

was unsuccessful, does not preclude an action upon an appropriate theory.

Troxell v. *Delaware L. & W. Railroad Co.*, 227 U. S. 434,

was an action by an administratrix of a deceased employee of a railroad to recover under the Federal Employers Liability Act:

> "The widow, now administratrix, had previously brought an action, as surviving widow of the deceased, against the railroad company for the same negligence and recovered judgment, which was reversed; whereupon she brought the action which the Court considers in the case cited."

The first action was brought for wrongful death, pursuant to terms of the state statute, authorizing such proceeding. In such an action, no recovery could be had if the death were caused by the negligence of a fellow servant. The second action which was brought for the same death of the same party, for the same beneficiaries, was in such form that recovery might be had for negligence of a fellow servant, because of the provision of the Federal Employers Liability Act, so permitting. The Court says that:

> "Assuming the correctness of the view that no recovery could be had in the first action, in which violation of the Federal Employers Liability Act was not alleged 'the fact that the plaintiff *attempted to* recover under that law and *pursued the supposed remedy* until the court adjudged that it never had existed, *would not* of itself, *preclude* the subsequent pursuit of a remedy for relief to which, in law, she is entitled.' " (Citing cases).

The Court further says that the first case—

> "Was based upon a *different theory* of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there can be no recovery for the negligence of the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was

> not involved in the second action and the plaintiff's right to recover because of the injury by the negligence of the fellow servants, was not involved in or concluded by the first suit." (Italics are ours.)

The Court holds that the plaintiff in the first action having been the widow, and in the second suit being the administratrix, there was *not a precise identity of parties*, and rejects the argument that they are "for practical purposes," the same. It is held that the defense of *res judicata* does not operate to bar the action.

In the case of *Newburyport Water Company* v. *City*, 85 Fed. Rep. 723 (Circuit Court for the District of Massachusetts), the matter arose upon demurrer to the bill of complaint, the bill alleging that a certain act of Massachusetts "as construed by the State court is in violation of the Fourteenth Amendment of the Constitution of the United States."

The statute there for consideration was one which provided that if a city desires to acquire a water works plant owned by private companies and the parties cannot agree upon its value, that the Supreme Judicial Court shall appoint three commissioners to determine its value and in determining its value "such value shall be estimated without enhancement on account of future earning capacity or good will or on account of the franchise of said company." (Page 724.)

The water company made a deed to the city of its water plant and the city took possession of it, and being unable to agree upon the value of the plant, commissioners were appointed, the commissioners being appointed upon petition of the water company, which "petitioned the court for appointment of commissioners under the act of 1894." The water company therefore invoked the tribunal to fix prices of its property. The commissioners fixed a price and judicial hearing was had in the State court as to propriety of the price so fixed and upon this review before the court the

State court confirmed the finding of the commissioners. By their finding they excluded the value of future earning capacity, good will and franchises.

A bill in equity was later filed to have such statute declared unconstitutional, the deed cancelled and the property restored to complainant, or if the property be left with the defendant, that just compensation upon a proper basis be paid to the plaintiff. It is in such suit that the opinion is presented. The Court says:

> "It is contended that on the face of the bill, this is an attempt to review and retry here a case between the same parties already tried and determined in the state court.
>
> "The answer to this is that the *constitutional questions* stated in this bill *were not raised in the state court* and could not have been drawn in question in that suit. *Moore* v. *Sanford,* 151 Mass. 285, 24 N. E. 323; *Pitkin* v. *City of Springfield,* 112 Mass. 509.
>
> "In *Moore* v. *Sanford,* the plaintiffs, in 1885, filed a petition under the statute for damages sustained by the taking of their lands and in 1889 brought a bill in equity to test the constitutionality of the state and to set aside the taking as unconstitutional. In holding that the plaintiff had a right, by an independent proceeding, to dispute the validity of the taking and the constitutionality of the act, the Court said:
>
> > 'The plaintiffs were entitled to have the question of the constitutionality of the statute determined and under their petition for damages they were by necessary inference compelled in that proceeding to admit that it was constitutional.' If the question of the constitutionality of the act of 1894 was not open to the complainant in the proceeding in the state court, the objection that the complainant should have raised the question in that suit, falls to the ground and constitutes no defense to the present bill."

Demurrer to the bill is overruled.

It may be asserted that as the aggregate experience of all companies was involved in the review proceeding in Mis-

souri, that this necessarily involved a consideration of the experience of the plaintiff, as a part of such aggregate experience, The fact that it was so collaterally under consideration is creative of no estoppel.

The issue in the review case was as to aggregate experience. The experience of plaintiff was only incidental as it was a part of such aggregate.

In the case of *Fordham* v. *Hicks,* 240 Fed. Rep. 751, the Court had for consideration a bill for specific performance of a parol contract for the sale of land. It was asserted that the plaintiff was estopped by reason of a prior judgment between the same parties in an action for rent. The Court holding to the contrary says:

> "As judgment therefore of a court of law or a decree in chancery, is an estoppel to the parties thereto and to those who are in privity with them. This is the rule. It is however carefully and strongly fenced. The judgment must *relate to the same question and must clearly decide it.* If it came collaterally under consideration or was only *incidentally considered, there is no estoppel.*"

Held that there was no adjudication.

In the case of *National Surety Co.* v. *Jenkins,* 18 Fed. (2nd) 707, (Circuit of Appeals for the 8th Circuit, opinion by Judge Philips; Judges Booth and Sanborn concurring), the Court had for consideration an action by the National Surety Company against a receiver to compel allowance of a claim for indemnity entered into between the bank and the National Company. Certain other parties were impleaded in the action, among others, the American Surety Company and the Receiver. The American Surety Company and the Receiver. The American Surety Company set up the decree in *National Surety Company* v. *Salt Lake County,* 5 Fed. (2nd) 34, and alleged that it was an adjudication.

In the former suit claimed to constitute the adjudication the National Company was a defendant and filed its answer

setting up the claim of subrogation "and also set up the indemnity agreement and the fact that it had duly presented its claim thereon to the Receiver. The National Company prayed that it be decreed to be entitled to subrogation * * * to its pro-rata share of all dividends thereafter to be declared."

The Courts says the sole issue in fact tried in the former case, was the question of priority of subrogation as between the American Company and the National Company. The Court says:

> "The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of subrogation. The cause of action sought to be enforced by the National Company in this case, is predicated upon its contract of indemnity."

The Court further says (p. 710):

> "Since the National Company seeks relief in the instant case upon a different and distinct cause of action from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein."

The Court further says (p. 710):

> "It is true that the National Company in its answer in the former suit alleged the contract of indemnity prayed that its claim thereon against the Receiver be allowed and approved. But such claim was *not a proper subject for litigation in the former suit.* It was the subject of an independent suit by the National Company against the Receiver. The American Company so contended in its brief on appeal in the former suit. Since it is a matter which could not properly have been litigated and was not actually litigated and was not necessarily determined by the decree in the former suit, it is not concluded by that decree, although it was put in issue by the pleadings. (Citing cases.) And the fact that the National Company set up the indemnity agreement and upon that agreement mistakenly sought the enforcement of a right which did not exist, it is not pre-

cluded from seeking in this action through a different remedy and upon another theory, the enforcement of a right to which it is legally entitled." (Citing cases.)

The Court, speaking of the former case, says:

"At most, the former case was merely illusory and suppositious and hence it cannot be considered as identical in any just sense of the term with the true cause of action correctly set up and supported by a right theory of the facts. Black on Judgments 733."

The difference between the present case and that before the Courts in the review proceeding is pointed out quite specifically by this Court in its opinion in dismissing the certiorari in the case of *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, which was certiorari from the review proceeding here asserted to be an adjudication. There Court there, after setting out Section 6283 of Missouri statutes, says:

"Section 6283 requires consideration *en masse* of 'the result of the earnings' of all the companies, and, upon finding an excessive 'aggregate profit,' it becomes the duty of the Superintendent to limit the 'aggregate collections' to not more than a reasonable profit. The reduced rates are applicable to the business of *all* companies alike and *without regard to* the amount of the past or prospective *profits or losses of any of them.* And the attack is by *joint action* of all the companies. It is not claimed by or on behalf of *any company* that, when applied to *its business,* the reduced rates are or would be too low to permit *the company* to make a reasonable profit or to have just compensation for *its* contracts of insurance. * * * Rates sufficient to yield adequate returns to some, may be confiscatory when applied to the business of others. But the latter have no constitutional right to prevent their enforcement against the former. The Fourteenth Amendment does not protect against competition. Moreover, 'aggregate collections' sufficient to yield a reasonable profit for *all* do not necessarily give to *each* just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment *merely because the aggregate col-*

lections are not sufficient to yield a reasonable profit or just compensation to *all* companies that happen to be engaged in the affected business." (Italics are ours.)

The opinion further says that:

"The complaint was framed to secure judicial review (§ 6284) of the determination of the respondent. The ground of attack was that the *aggregate* profits were not excessive and that the *aggregate* collections permitted under the reduced rates were too low. * * * The Court was *not called upon to determine whether* the order would operate to *deprive any company of its property* without due process of law. It treated the suit as one to obtain the review provided for by § 6284." (Italics are ours.)

It is not every review which is the legal equivalent of an injunction proceeding in the Federal Court, even when such a review has the qualities of a judicial review. If its nature is such that the issue of individual confiscation is not involved, then that issue is still open for consideration by the Federal Courts. A case making this distinction is the case of *Ohio Valley Company* v. *Ben Avon Borough*, 253 U. S. 287, where the Court held that the state review proceeding was in its general nature judicial, but commenting upon it says:

"This is not disputed, but their jurisdiction as ruled by the Supreme Court (of Pennsylvania) *stops short* of what must be plainly entrusted to some court in order that there may be due process of law. Plaintiff in error has *not* had proper *opportunity for an adequate* judicial *hearing as to confiscation*, and unless such an opportunity is now available and can be definitely indicated by the court below in the exercise of its power finally to construe the law of the state (including of course Section 31) the challenged order is invalid." (Italics are ours.)

The statutory review proceedings asserted to be a bar in this case presented no opportunity whatever for hearing the question of confiscation, and can form no bar to a proceeding in which such issue is properly presented.

In the case of *Van Wert Gaslight Co.* v. *Public Utilities Commission of Ohio,* 299 Fed. Rep. 670, a statutory Court of three judges had before it an injunction to restrain a gas rate as confiscatory. The question as to the confiscatory or non-confiscatory nature of the rate had its basis in disagreement as to the proper basis to be employed in putting a value upon the properties upon which a return was to be allowed. The commission rejected the basis presented by the gaslight company and adopted, on the contrary, "an inflexible basis for calculation of valuatiion." Review proceedings were prosecuted to the Supreme Court of Ohio from the order of the commission. The Supreme Court of Ohio affirmed the valuation by the Utilities Commission. It was asserted that the prosecution of this review proceeding foreclosed a bill of equity in the Federal Court for an injunction. The Federal Court held that the basis adopted by the commission was arbitrary and violative of the Fourteenth Amendment, or at least appeared so to be upon its face. It was also held that the review in the Ohio Supreme Court was a judicial review. The Supreme Court of Ohio in the review proceeding held (as its holding is characterized by the Federal court) that "in such proceedings the plaintiff is not entitled to a full judicial inquiry into the facts and the independent judgment of the Court upon the facts as well as the law."

The bar to a full judicial inquiry into the facts as to confiscation in the case at bar was created by the terms of the statute itself. The Supreme Court of Ohio according to the statement in the case cited held that it would not, upon a review, pass upon the confiscatory nature of the Commission's action. So the Missouri Supreme Court was bound to hold here, that the proceeding before it was one for consideration of aggregate experience in which the experience of an individual company could not be considered. In the case cited the Court says that the effect of the holding of the State court was:

"A direct denial to the plaintiff utility of *that kind* of an inquiry to which it was held to be entitled in *Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, following *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, and cases there cited,"

and holds that the decision of the Supreme Court of Ohio "interpreted the State statute as withholding from the courts (of Ohio) the power to determine the question of confiscation." Such power being expressly withheld by the terms of the Missouri statute, the State court, in the review proceeding *could not* adjudge the question which the Court here has to determine.

The case falls within the language of the *Van Wert case*, wherein the Court says, that although there had been a review, judicial in its general character, it "was not *such judicial review* as constituted due process of law." In the case cited, that Court said that to hold that such review proceeding in which the issue of confiscation could not be tried out was a bar to a subsequent suit resting upon the claim of confiscation, is repugnant to the Court's sense of justice, and that the complainant was entitled to the relief of injunction, and says:

"To hold otherwise would be to deprive the complainant of its day in court upon the question of confiscation."

The question is not whether there has been *some kind of* a review but whether there has been an *adequate* judicial review of the particular question presented, which here is, unconstitutionality of the statute and rate order, and confiscation. In such a situation the inquiry is: What was the issue which has been previously tried? The Court in the *Van Wert case* says:

"That question depends, not upon the character of the body, but upon the character of the proceedings.

"The complainant in this case has never had a *full judicial inquiry* into the question of valuation, and cannot now be estopped from claiming the benefit of the true valuation of its properties in the decision *of the issue of confiscation.*" (P. 676.)

CONCLUSION.

To sum the matter, appellant has a clear right to relief—appellee in effect concedes the right but sets up two matters of affirmative defense against the application (*a*) that this is a moot case and (*b*) that the matter is *res adjudicata*. Neither of such contentions has any support whatever in anything in the record. Neither has any substance in law. The court below should be directed to grant an interlocutory injunction according to the application of plaintiff.

Respectfully submitted,

ROBERT J. FOLONIE,
WILLIAM S. HOGSETT,
JOHN S. LEAKY,
ASHLEY COCKRILL,
Counsel for Appellant.

FILE COPY

FILED
NOV 11 1929
CHARLES ELMORE CROPLEY
CLERK

No. 104.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, APPELLANT,

VS.

JOSEPH B. THOMPSON, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, AND STRATTON SHARTEL, ATTORNEY GENERAL OF THE STATE OF MISSOURI, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEES.

STRATTON SHARTEL,
Attorney General of Missouri,
G. C. WEATHERBY,
Assistant Attorney General,
FLOYD E. JACOBS,
JOHN T. BARKER,
Counsel for Appellees.

INDEX

Statement 1
Points and Authorities 5
Argument 10
Conclusion 84

CITATIONS

Aetna Ins. Co. vs. Hyde, 315 Mo. 13 . . . . . .2, 4, 9, 25, 35, 77, 81, 82
Aetna Ins. Co. vs. Hyde, 275 U. S. 440 . . . . . 2, 25
Aetna Ins. Co. vs. Travis, 259 Pacific 1068 . . . .4, 7, 60
Aetna Ins. Co. vs. Hyde, 285 S. W. l. c. 70, 71, 72 . . . . . .7, 52, 57
Allen vs. Georgia, 166 U. S. l. c. 140 . . . . . .5, 17
Alejandrino vs. Quezon, et al., 271 U. S. l. c. 535 . .5, 18
Ark. Rate Cases, 187 Fed. 290 . . . . . .7, 56
Baltimore S. S. Co., et al. vs. Phillips, 274 U. S. l. c. 321 . . . . . .8, 71
Banton vs. Belt Line Ry., 268 U. S. 413 . . . . . .5, 23
Bank of the U. S. vs. Bank of Washington, 6 Pet. 8, 8 L. Ed. 299 . . . . . .6, 39
Brownlow, et al., Comrs. vs. Schwartz, 261 U. S. l. c. 217 . . . . . .5, 15
Brown vs. Detroit Trust Co., 193 Fed. l. c. 626 . . . .6, 44
Cummings vs. Mugge, 94 Ill. 186 . . . . . .6, 43
Cedar Rapids Gaslite Co. vs. Cedar Rapids, 144 Iowa 426, 48 L. R. A. (N. S.) 1025 . . . . . .7, 56
Chicago & Grand Trunk Ry. Co. vs. Wellman, 143 U. S. 339, l. c. 345 . . . . . .7, 53
Chicago, Great Western Ry. Co. vs. Kendall, Governor, et al., 266 U. S. l. c. 100 . . . . . .8, 76
City of St. Louis vs. St. Louis Gaslight Co., 70 Mo. l. c. 121 . . . . . .6, 49
Company vs. Lewis, 180 N. Y. Supp. l. c. 586 . . . .7, 56

Consolidated Gas Co. vs. N. Y., 157 Fed. 849 .....7, 56
Company vs. Nixon, 181 N. Y. Supp. 623 .....7, 56
Company vs. Barnes, 189 Fed. 769 .....9, 82
Company vs. Railroad, 77 N. H. 6, 45 L. R. A. (N. S.) 845 .....9, 82
21 C. J. p. 172 .....5, 29
3 Cyc. 462 .....6, 38
10 C. J. 411, 12, 13, 18 .....7, 57
12 C. J. 850 .....9, 82
Darnell vs. Edwards, 244 U. S. 564, 37 Sup. Ct. Rep. 702 .....7, 57
Detroit & M. R. Co. vs. Michigan R. R. Com., et al., 203 Fed. l. c. 871 .....8, 65
Detroit & Mackinac Ry. vs. Mich. R. R. Com., 235 U. S. l. c. 404, 406 .....8, 66
18 Encyc. of Pl. & Pr. 871 .....6, 38
Fullman vs. Steel City Electric Co., 2 Fed. (2d Ed.) 4, l. c. 6 .....6, 33
Fugurul vs. Rivera, 232 U. S. l. c. 374 .....8, 72
10 Fletcher Cyc. Cor. pp. 747, 748 .....7, 57
Galveston Electric Co. vs. Galveston, 258 U. S. 388, 42 Sup. Ct. Rep. l. c. 356 .....7, 56
German Alliance Insurance Co. vs. Lewis, 233 U. S. 389, 34 Sup. Ct. Rep. 612; L. R. A. 1915, 1189 .....9, 80
Groesbeck vs. Duluth, 250 U. S. 607 17
Gott vs. Powell, 41 Mo. l. c. 420 .....6, 38
Haebler vs. Myers (N. Y.), 15 L. R. A. 588 .....6, 41
Hess vs. Deppen, 125 Ky. 425, 15 Am. & Eng. Ann. Cas. 670 .....6, 42
Henderson vs. McWaters, 104 S. C. 268 .....9, 82
In re Freight Rates, 9 I. C. R. 382 .....7, 56
Ill. Cent. R. R. Co. vs. Interstate Commerce Com., 206 U. S. 441, 27 Sup. Ct. Rep. 700 .....7, 56
Insurance Co. of North America, et al. vs. Welch, Ins. Com'r, et al., 49 Okla. 620, 154 Pac. l. c. 50 .....9, 80

Kansas City Southern Ry. Co. vs. U. S., 52 L. R. A. (N. S.) l. c. 51 .....7, 56
Kline vs. Vogel, 90 Mo. l. c. 245, 247 .....6, 36
Langley vs. Devlin, et al., 163 Pac. 395; 4 A. L. R. l. c. 42 .....6, 35
Legg vs. Company, 1 Calif. R. C. R. 11 .....7, 56
Martin vs. Howard, 96 Neb. 278, 147 N. W. 689 ..9, 82
Meccano, Ltd. vs. John Wanamaker, New York, 253 U. S. l. c. 141 .....8, 78
Mo. Rate Cases, 230 U. S. 474, 33 Sup. Ct. Rep. l. c. 979 .....7, 56
Moncrief vs. Palmer, 114 Atl. 181; 17 A. L. R. l. c. 120 .....6, 34
Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 762 .....7, 56
National Union Fire Insurance Co. vs. Wanberg, 260 U. S. l. c. 73 .....9, 80
Neblett vs. Macfarland, 92 U. S. l. c. 103 .....6, 32
Northwestern Fuel Co. vs. Brock, 139 U. S. 216, 35 L. Ed. 151, l. c. 219 .....6, 40
Pan American Co. vs. U. S., 273 U. S. l. c. 505 ..5, 30
People vs. Company, 126 Ill. App. 636 .....9, 82
Pierce vs. National Bank of Commerce in St. Louis, 268 Fed. l. c. 495 .....8, 74
Puget Sound Electric Ry. vs. Lee, et al., 207 Fed. l. c. 865 .....8, 70
Railroad Co. vs. Brown, 43 Mo. 294 .....6, 39
Railroad Co. vs. Barker, 210 Fed. Rep. 902, l. c. 914 .....6, 44
Re North Adams, 27 Mass. G. & E. L. C. R. 17 ....7, 56
R. S. Mo. 1919, Sec. 6284 2
2 R. C. L. p. 169 .....5, 19
27 R. C. L. p. 82 .....5, 19
1 R. C. L. p. 317 .....5, 19
Smith vs. Apple, 6 Fed. (2d) l. c. 563 .....8, 73
Smythe vs. Ames, 169 U. S. 466, 18 Sup. Ct. Rep. 418 .....7, 56

Southern Railway vs. Com'rs, 196 Fed. 558 .....6, 43
State of Neb. vs. Adams Express Co., 85 Neb. 25, 42 L. R. A. (N. S.) l. c. 401 .....7, 54
State vs. Virginia & T. R. Co., et al., 24 Nev. 53, 49 Pac. 945 .....7, 56
State, ex rel., Hyde, Supt. vs. Westhues, J., 290 S. W. l. c. 448 .....5, 22
State, ex rel., Hyde vs. Westhues, 316 Mo. 457 50
State, ex rel. vs. Public Service Commission, 252 S. W. l. c. 452 .....7, 57
State of Missouri vs. C. B. & Q. R. R. Co., 241 U. S. l. c. 539, 541, 542 .....8, 67
State, ex rel., Waterworth vs. Harty, Superintendent, 278 Mo. l. c. 692 .....9, 81
Talbott vs. Hill, et al., 261 Fed. l. c. 246 .....6, 32
Thomas, Trustee vs. Railroad Co., 109 U. S. l. c. 526 .....5, 31
U. S., ex rel., Norwegian Nitrogen Co. vs. Commission, 274 U. S. 106, l. c. 110, 111 .....5, 15
U. S. vs. Trinidad Coal & Coking Co., 137 U. S. l. c. 171 .....5, 30
Union Pacific R. R. Co. vs. U. S., 99 U. S. 402 ....7, 56
United Fuel Gas Co. vs. Public Service Com. of West Virginia, et al., 278 U. S. l. c. 326 .....8, 77
West Texas Loan Co., et al. vs. Beckham, 201 S. W. l. c. 583 .....5, 29

No. 104.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, APPELLANT,

VS.

JOSEPH B. THOMPSON, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, AND STRATTON SHARTEL, ATTORNEY GENERAL OF THE STATE OF MISSOURI, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEES.

STATEMENT.

On October 9th, 1922, the Insurance Department of Missouri, after a full hearing, ordered a 10 per cent reduction in fire insurance rates, effective November 15th, 1922 (R. 5). All of the fire insurance companies doing business in Missouri proceeded jointly under Section

6284, Revised Statutes of Missouri, 1919, to have such order reviewed and, after a full hearing, the Supreme Court of Missouri upheld the reduction order. (*Aetna Insurance Company* v. *Hyde,* 315 Mo. 113.) Certiorari proceedings were thereupon instituted in this court and the decision of the Missouri Supreme Court was undisturbed and became final. (*Aetna Insurance Company, et al.* v. *Hyde, et al.,* 275 U. S. 440.)

Thereupon appellant and all other fire insurance companies doing business in Missouri brought individual suits in the District Court seeking again to litigate the questions which had been litigated through the Missouri Supreme Court and on to the Supreme Court of the United States.

A three-judge court was assembled and it denied a temporary injunction to appellant and one hundred and thirteen other companies on three grounds, although the opinion might be said to have finally rested on one ground:

(a) Because appellant and these other companies had stipulated that in case such reduction order through the state courts was upheld, they would refund all excess premiums collected, and appellant had failed to do so (R. 108, 109).

(b) Because the judgment of the Missouri Supreme Court sustaining such reduction order had become final and was *res adjudicata,* and the same experience could not again be litigated (R. 105).

(c) Because the burden of proving confiscation was not met by appellant because it had not fully disclosed its income and outgo (R. 127).

It is true the court held that while appellant had not shown confiscation, it would allow a further proceeding on the theory that appellant might be able to amend its petition. Yet the holding on this point was against appellant and the most casual examination of this petition will disclose that appellant failed entirely to meet the burden of proof and did not disclose fully its income and outgo. The court held the matter regarding the 10 per cent reduction was closed, except perhaps for a consideration of the effect of such reduction as to the future experience or appellant.

The only question therefore before this court is whether or not the refusal of this temporary injunction was arbitrary because great deference will be paid to the finding of the lower court on this point. The record discloses that the temporary injunction was properly refused and that this seven years litigation, in so far as the past experience of these companies is concerned, is at an end.

The decision below, after denying a temporary injunction, passed upon many questions which perhaps will not be reviewed by this court. The position of the State as to the method of figuring profit and loss was sustained. The position of the State that the decision of the Missouri Supreme Court, undisturbed by this court, was final, and that the experience of the past could not again be litigated and that nothing remains to be done except to make restitution, was sustained. The position of the State that appellant was not entitled to a temporary injunction, because of having violated its stipulation and not having made restitution, was sustained.

The court, however, held that in figuring profit and loss interest earnings on unearned premiums should not be included as income. We disagree with this holding, but instead of briefing this matter fully, we invite a reading of the Missouri and Kansas opinions on this point where the State was sustained and the matter is fully discussed. *Aetna Insurance Company* v. *Hyde,* 315 Mo. 13, 285 S. W. 65. *Aetna Insurance Company, et al.* v. *Travis,* 259 Pacific 1068.

The court also held against the State in refusing to exclude over two million dollars excess commissions paid agents in St. Louis, or at least the court indicated it was not satisfied with such exclusion. The opinion of the Missouri Supreme Court is so clear on this point that we adopt it. If this court cares to go into these questions it will find they are fully discussed in these two opinions, and we feel unable to add anything to them.

POINTS AND AUTHORITIES.

I.

Since this appeal was taken, appellant and all other fire insurance companies doing business in Missouri have voluntarily put the 10 per cent reduction in effect. Inasmuch as the suits in the District Court were to prevent such reduction from going into effect, the question is now a moot one, and this appeal should be dismissed.

Banton v. *Belt Line Ry.*, 268 U. S. 413.
U. S. ex rel. Norwegian Nitrogen Co. v. *Commission*, 274 U. S. 106, l. c. 110, 111.
Brownlow, et al., Comrs. v. *Schwartz*, 261 U. S. l. c. 217.
Allen v. *Georgia*, 166 U. S. l. c. 140.
Alejandrino v. *Quezon, et al.*, 271 U. S. l. c. 535.
2 R. C. L. p. 169.
27 R. C. L. p. 82.
1 R. C. L. p. 317.
State ex rel. Hyde, Supt. v. *Westhues, J.*, 290 S. W. l. c. 448.

II.

The three-judge court in this case rightfully held that it would not consider the granting of a temporary injunction until restitution was made of this money wrongfully collected and retained because of a stipulation agreeing to refund same. The maxim of "He who seeks equity must do equity" was properly upheld.

West Texas Loan Co., et al. v. *Beckham*, 201 S. W. l. c. 583.
21 C. J. p. 172.
U. S. v. *Trinidad Coal & Coking Co.*, 137 U. S. l. c. 171.
Pan American Co. v. *U. S.*, 273 U. S. l. c. 505.
Thomas, Trustee, v. *Railroad Co.*, 109 U. S. l. c. 526.

Neblett v. *Macfarland*, 92 U. S. l. c. 103.
Talbott v. *Hill, et al.*, 261 Fed. l. c. 246.
Fullman v. *Steel City Electric Co.*, 2 Fed. (2d Ed.) 4, l. c. 6.
Moncrief v. *Palmer*, 114 Atl. 181; 17 A. L. R. l. c. 120.
Langley v. *Devlin, et al.*, 163 Pac. 395; 4 A. L. R l. c. 42.
Kline v. *Vogel*, 90 Mo. l. c. 245, 247.
3 Cyc. 462.
18 Encyc. of Pl. & Pr. 871.
Gott v. *Powell*, 41 Mo. l. c. 420.
Railroad Co. v. *Brown*, 43 Mo. 294.
Bank of the U. S. v. *Bank of Washington*, 6 Pet. 8, 8 L. Ed. 299.
Northwestern Fuel Co. v. *Brock*, 139 U. S. 216. 35 L. Ed. 151, l. c. 219.
Haebler v. *Myers* (N. Y.), 15 L. R. A. 588.
Hess v. *Deppen*, 125 Ky. 425, 15 Am. & Eng. Ann. Cas. 670.
Cummings v. *Mugge*, 94 Ill. 186.
Southern Railway v. *Com'rs*, 196 Fed. 558.
Brown v. *Detroit Trust Co.*, 193 Fed. l. c. 626.
Railroad Co. v. *Barker*, 210 Fed. Rep. 902, l. c. 914.
City of St. Louis v. *St. Louis Gaslight Co.*, 70 Mo. l. c. 121.

III.

The District Court held that all of the petitions for temporary injunction should be dismissed because of the failure to fully disclose the experience of the companies. They submitted their experience on an erroneous and improper basis. The court, after condemning such method and stating that it could very well deny an application for a temporary injunction for such reason, refused to do so on the theory that such petitions could be amended. Obviously, these petitions do not state any cause of action and no equity is contained in any of them. They failed

to inform the court as to the full amount of their income and outgo. One complaining about a confiscatory rate must make full disclosure of its entire business.

Chicago & Grand Trunk Ry. Co. v. *Wellman,* 143 U. S. 339, l. c. 345.

State of Neb. v. *Adams Express Co.,* 85 Neb. 25, 42 L. R. A. (N. S.) l. c. 401.

Mo. Rate Cases, 230 U. S. 474, 33 Sup. Ct. Rep. l. c. 979.

Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 762.

Kansas City Southern Ry. Co. v. *U. S.,* 52 L. R. A. (N. S.) l. c. 51.

Company v. *Lewis,* 180 N. Y. Supp. l. c. 586.

Ark. Rate Cases, 187 Fed. 290.

State v. *Virginia & T. R. Co., et al.,* 24 Nev. 53, 49 Pac. 945.

Smythe v. *Ames,* 169 U. S. 466, 18 Sup. Ct. Rep. 418.

Union Pacific R. R. Co. v. *U. S.,* 99 U. S. 402.

Consolidated Gas Co. v. *N. Y.,* 157 Fed. 849.

Cedar Rapids Gaslite Co. v. *Cedar Rapids,* 144 Iowa 426, 48 L. R. A. (N. S.) 1025.

Galveston Electric Co. v. *Galveston,* 258 U. S. 388, 42 Sup. Ct. Rep. l. c. 356.

Company v. *Nixon,* 181 N. Y. Supp. 623.

Re North Adams, 27 Mass. G. & E. L. C. R. 17.

Legg v. *Company,* 1 Calif. R. C. R. 11.

In re Freight Rates, 9 I. C. R. 382.

Ill. Cent. R. R. Co. v. *Interstate Commerce Com.,* 206 U. S. 441, 27 Sup. Ct. Rep. 700.

Darnell v. *Edwards,* 244 U. S. 564, 37 Sup. Ct. Rep. 702.

State ex rel. v. *Public Service Commission,* 252 S. W. l. c. 452.

10 C. J. 411, 12, 13, 18.

10 Fletcher Cyc. Cor. pp. 747, 748.

Aetna Insurance Company, et al. v. *Hyde,* 285 S. W. l. c. 70, 71, 72, 78.

Aetna Insurance Company, et al. v. *Travis,* 259 Pacific, l. c. 1076.

IV.

All of the fire insurance companies in Missouri, including appellant, selected their own forum and proceeded to seek a joint review through the state courts as to the validity of the 10 per cent reduction order; the decision of the Missouri Supreme Court sustaining such reduction was undisturbed by the Supreme Court of the United States; the decision of the three-judge court in refusing a temporary injunction to again litigate such reduction was proper as the matter was then res adjudicata on all questions presented.

Detroit & M. R. Co. v. *Michigan R. R. Com., et al.*, 203 Fed. l. c. 871.
Detroit & Mackinac Ry. v. *Mich. R. R. Com.*, 235 U. S. l. c. 404, 406.
State of Missouri v. *C. B. & Q. R. R. Co.*, 244 U. S. l. c. 539, 541, 542.
Puget Sound Electric Ry. v. *Lee, et al.*, 207 Fed. l. c. 865.
Baltimore S. S. Co., et al. v. *Phillips*, 274 U. S. l. c. 321.
Fugurul v. *Rivera*, 232 U. S. l. c. 374.
Smith v. *Apple*, 6 Fed. (2d) l. c. 563.
Pierce v. *National Bank of Commerce in St. Louis*, 268 Fed. l. c. 495.

V.

While the decision of the three-judge court is not conclusive on this court, yet great deference will be paid to its findings, and where the decision was justified by both the law and the facts, as in this case, this court will not disturb same.

Chicago, Great Western Ry. Co. v. *Kendall, Governor, et al.*, 266 U. S. l. c. 100.
United Fuel Gas Co. v. *Public Service Com. of West Virginia, et al.*, 278 U. S. l. c. 326.
Meccano, Ltd., v. *John Wanamaker, New York*, 253 U. S. l. c. 141.

VI.

The Missouri Fire Insurance Rating Act is constitutional. Fire insurance is a business affected with a public interest and it is well-settled that a state may regulate fire insurance rates.

National Union Fire Insurance Co. v. *Wanberg*, 260 U. S. l. c. 73.

German Alliance Insurance Co. v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. Rep. 612; L. R. A. 1915, 1189.

Insurance Co. of North America, et al. v. *Welch, Ins. Com'r, et al.*, 49 Okla. 620, 154 Pac. l. c. 50.

State ex rel. Waterworth v. *Harty, Superintendent*, 278 Mo. l. c. 692.

Aetna Insurance Co., et al. v. *Hyde, Superintendent*, 315 Mo. 13, 285 S. W. 65.

Henderson v. *McWaters*, 104 S. C. 268.

Martin v. *Howard*, 96 Neb. 278, 147 N. W. 689.

Company v. *Barnes*, 189 Fed. 769.

Company v. *Railroad*, 77 N. H. 6, 45 L. R. A. (N. S.) 845.

People v. *Company*, 126 Ill. App. 636.

12 C. J. 850.

ARGUMENT.

I.

Since this appeal was taken, appellant and all other fire insurance companies doing business in Missouri have voluntarily put the 10 per cent reduction in effect. Inasmuch as the suits in the District Court were to prevent such reduction from going into effect, the question is now a moot one, and this appeal should be dismissed.

Since November 15, 1922, when the Superintendent of the Insurance Department of the State of Missouri ordered a reduction of 10 per cent in fire insurance rates, appellant and every other fire insurance company in Missouri has litigated the confiscatory effect of such reduction. The Supreme Court of Missouri held against them and the Supreme Court of the United States held against them. They then went into the District Court for individual injunctions and that court refused a temprorary injunction to one hundred and fourteen companies, of which appellant is one, and all of such companies appealed to this court, but are presenting this case as typical of the others.

The only relief asked in the District Court was a temporary injunction to restrain the officials of the State from putting this 10 per cent reduction order in effect. It was strenuously urged that to put such reduction order in effect would require appellant and all other companies to do business at a loss, and that was the question that has been litigated for about seven years.

Since then, and on the 9th day of August, 1929, and after this appeal was taken to this court, appellant and all of these other one hundred and fourteen fire insurance companies doing business in Missouri have voluntarily and of their own accord put this 10 per cent reduction in effect, and the policyholders of Missouri are securing the benefits of such reduction.

While the matter may not properly be before this court, yet in view of the actual records which we will submit, this court should know the condition which really exists at this time. The first notice received by the Insurance Department of Missouri stating that the 10 per cent reduction order would be put in effect was received August 9, 1929, and is as follows:

"Missouri Inspection Bureau
Fire Insurance Rating
1330 Pierce Bldg.
St. Louis, Mo.

August 8, 1929.

Honorable Joseph B. Thompson,
Superintendent of the Insurance Department
of the State of Missouri.

Dear Sir:

On behalf of each of the subscribers to Missouri Inspection Bureau, we do (under protest that order of the Superintendent of Insurance Department of Missouri of date October 9, 1922, ordering a reduction in rates subsequently designated to apply as of February 1, 1928, to all classes of fire, lightning, hail and windstorm insurance, is an unconstitutional invasion of the rights of each of such subscribers guaranteed to it by the Fourteenth Amendment of the Federal Constitution,) hereby make filing under such protest, of a reduction in rates of ten per cent

upon fire, lightning, hail and windstorm insurance upon all classes as of February 1, 1928, except automobile insurance.

Yours very truly,

(signed) Waterworth & Terry.
Managers

Missouri Inspection Bureau."

"The State of Missouri
Insurance Department

Certified Copy

I, Jos. B. Thompson, Superintendent of the Insurance Department of the State of Missouri, do hereby certify that the annexed pages are a true and correct copy of the original letter received from the Missouri Inspection Bureau, 1330 Pierce Bldg. St. Louis, Missouri, dated August 8, 1929, relating to a reduction in rates of ten per cent upon fire, lightning, hail and windstorm insurance upon all classes as of February 1, 1928, which said original is now on file in this department.

In Witness Whereof, I have hereunto set my hand and caused to be hereto affixed the Seal of said Department, at my office in the City of Jefferson, this 18th day of October, 1929.

(signed) Jos. B. Thompson,
Superintendent.

(Seal) By.....
Chief Clerk."

Thereafter, and on the 9th day of August, 1929, the Missouri Actuarial Bureau at St. Louis, representing all of the fire insurance companies doing business in Missouri under the Missouri Statutes, notified the Insurance Department of Missouri that such reduction had actually been put into effect, and a certified copy of such notice is as follows:

"Missouri Inspection Bureau
Fire Insurance Rating
1330-1346 Pierce Bldg.

James A. Waterworth
Paul W. Terry
Managers

St. Louis, Mo.

Branch Offices
Kansas City
St. Joseph
Hannibal
Joplin

August 9, 1929.

To Agents:

On behalf of each of the subscribers to the Missouri Inspection Bureau, we have filed with the Insurance Department a reduction in rates of ten per cent upon fire, lightning, hail and windstorm insurance upon all classes as of February 1, 1928.

In accordance with such filing, you are advised that all rates upon all classes of fire, lightning, hail and windstorm insurance, (*except automobile insurance*), rates for which are published by the Missouri Inspection Bureau, are subject to a reduction of ten per cent (10%). This reduction shall not be applicable to any policy issued effective before February 1, 1928, and now in force; and shall not be made applicable during the term for which such policy was issued by means of endorsement, *pro rata* cancellation, issuance of new policy in lieu thereof or any other device.

Under the above mentioned filing, refund should be made to policyholders upon all policies issued effective on or after February 1, 1928, such refund to be in the amount of ten per cent (10%) of all premiums on fire, lightning, hail and windstorm classes on Missouri property, *except automobile insurance.* Extreme care should be exercised to see that the refund goes to the proper party where there have been cancellations, assignments of policies and similar changes. The details of these refunds may come under the scrutiny of the Insurance Department or the courts; therefore it is especially important that your records and those of your companies be accu-

rate and complete. A supply of the receipt which must be signed by the assured is being sent you under separate cover from this office. Additional supply to meet your needs may be obtained upon application.

This filing and these refunds are made under protest that order of the Superintendent of Insurance Department of Missouri of date of October 9, 1922, ordering a reduction in rates subsequently designated to apply as of February 1, 1928, to all classes of fire, lightning, hail and windstorm insurance, is an unconstitutional invasion of the rights of each of such subscriber guaranteed to it by the Fourteenth Amendment of the Federal Constitution. The subscribers to the Missouri Inspection Bureau, as you are well aware, have undertaken only to assert and establish their legal rights in the courts, which is the right of every citizen, and they are continuing their efforts along this line until these legal rights are definitely established.

Yours very truly,

Waterworth & Terry,
Managers."

These records are official records in the office of the Insurance Department of Missouri at Jefferson City, and appellant will not question them. The question therefore is, may these insurance companies litigate a 10 per cent reduction order for seven years and then voluntarily and of their own accord put the same into effect and still be entitled to be heard in this court upon the failure of the District Court to grant a temporary injunction to restrain such reduction from going into effect. We contend that it is a moot question, and insist that this appeal should be dismissed because of the voluntary action of the appellant itself.

One of the latest expressions of this court on this point is *United States ex rel. Norwegian Nitrogen Company* v. *Tariff Commission,* 274 U. S. 106. In holding that a question was a moot one where the President had acted in fixing a new rate of duty, Mr. Justice Stone, at page 110, said:

> "We conclude that the case had become moot before the review below and that it is unnecessary for us to indulge in a discussion of the merits."

And at page 111, in holding that this court would not pass upon a moot question, he said:

> "Assuming that the plaintiff is entitled to a hearing of the character demanded whenever an investigation is had, which we do not decide, it would be an idle ceremony to require such a hearing upon an investigation which we may not command and which may never be made. In such circumstances there can be no effectual relief by mandamus and the Court of Appeals should have remanded the cause with directions to dismiss the petition as moot. *Brownlow* v. *Schwartz,* 261 U. S. 216; *Mills* v. *Green,* 159 U. S. 651, 653."

In this particular case an injunction was asked to restrain the officials of the State from putting into effect a 10 per cent reduction. After the case was appealed to this court appellant voluntarily put such reduction into effect, and in holding that this court will not consider the question because moot, Mr. Justice Sutherland, in *Brownlow, et al., Commissioners of the District of Columbia, et al.* v. *Schwartz,* 261 U. S. l. c. 217, said:

> "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something

to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain. See *Mills* v. *Green*, 159 U. S. 651; *Codlin* v. *Kohlhausen*, 181 U. S. 151; *Little* v. *Bowers*, 134 U. S. 547, 556; *Singer Manufacturing Co.* v. *Wright*, 141 U. S. 696, 699; *American Book Co.* v. *Kansas*, 193 U. S. 49; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475; *Berry* v. *Davis*, 252 U. S. 468, 470; *Board of Public Utility Commissioners* v. *Compania General de Tabacos de Filipinas*, 249 U. S. 425; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Heitmuller* v. *Stokes*, 256 U. S. 359.

"It is urged that the permit was issued by the Inspector of Buildings only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate. *American Book Co.* v. *Kansas, supra.* The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the Court of Appeals requiring the issuance of the mandamus in force—at least apparently so—notwithstanding the basis therefore has disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint or petition. *United States* v. *Hamburg-American Co., supra; Berry* v. *Davis, supra; Board of Public Utility Commissioners* v. *Compania General de Tabacos de Filipinas,*

supra; Commercial Cable Co. v. *Burleson, supra; Heitmuller* v. *Stokes, supra.*"

We are familiar with the case of *Groesbeck et al.* v. *Duluth, South Shore & Atlantic Railway Company,* 250 U. S. 607, but there is quite a difference between that case and this one. There a two-cent passenger act was passed by the legislature and a suit was brought to prevent it from going into effect. Upon a temporary injunction being granted, the railroad was required to impound and there was eight hundred thousand dollars in possession of the court, and this court naturally held that although the law was later repealed it could not dispose of the matter without considering the effect of such reduction as to the persons to whom this money belonged. In this case no impounding was had, but the record shows the companies simply have a bond for about one million dollars and, as the refund will amount to over twelve million dollars, clearly an attempt will have to be made by the policyholders to recover their money. Another difference is that in this case appellant and all other fire insurance companies litigated the effect of this reduction through the courts of Missouri and on to the Supreme Court of the United States, and when that court refused to interfere with such reduction, the matter was at an end as to all past experiences and there was nothing for the companies to do but to refund.

Inasmuch as appellant has voluntarily put this reduction into effect, there is nothing for this court to do except to dismiss its appeal, a held by this court in *Allen* v. *Georgia,* 166 U. S. l. c. 140:

> "In civil cases it has been the universal practice to dismiss the case whenever it became apparent that there was no real dispute remaining between the plaintiff and the defendant, or that the case had been settled or otherwise disposed of by agreement of the parties, and there was no actual controversy pending. *Lord* v. *Veazie,* 8 How. 251; *Gaines* v. *Hennen,* 24 How. 553, 628; *Cleveland* v. *Chamberlain,* 1 Black, 419; *Wood-Paper Co.* v. *Heft,* 8 Wall. 333; *Dakota County* v. *Glidden,* 113 U. S. 222; *Little* v. *Bowers,* 134 U. S. 547; *California* v. *San Pablo &c. Railroad,* 149 U. S. 308."

In *Alejandrino* v. *Quezon et al.,* 271 U. S. 528, Mr. Chief Justice Taft refused to pass upon an alleged wrongful suspension of an officer in the Philippine Islands. Before the case reached that court the term of suspension was over. It was insisted, however, that the court should pass upon the matter as affecting the salary which was due such officer during such suspension. This the court refused to do because only ancillary or incidental to the main purpose of the suit, which was for restoration. The facts in this case are similar to the ones in the present suit and, after refusing to take jurisdiction, the court at page 535 said:

> "The case having become moot as respects its main features, and the other feature being incidental and not in itself a proper subject for determination as now presented, further steps looking to an adjudication of the cause can neither be had here nor in the court below. In this situation we must, following the established practice of this court, vacate the judgment below and remand the cause with directions to dismiss the petition without costs to either party. *Public Utility Commissioners* v. *Compania General de Tabacos de Filipinas,* 249 U. S. 425; *Brownlow* v. *Schwartz,* 261 U. S. 216, and cases cited."

In 2 Ruling Case Law, page 169, it is said:

"When, pending the appeal, the circumstances change to such an extent that the appeal involves merely a moot question, it will, as a general rule, be dismissed. Thus if the term of imprisonment expires pending an appeal by the jailer from a decision in a *habeas corpus* proceeding releasing a prisoner from custody, the appeal will be dismissed. On the same principle an appeal from an order granting a writ of mandamus will be dismissed, or the order granting the writ affirmed irrespective of the merits of the appeal, where it appears that the act which the writ commands to be performed, has been performed, and of course the same is true where an event occurs pending an appeal from an order refusing the writ which renders it impossible for the court to grant the relief sought."

And in 27 Ruling Case Law, page 82, it is said:

"It is the general rule that a real, and not a fictitious, federal question is essential to the jurisdiction of the supreme court over the judgments of state courts. The assertion of a federal right must not be so wanting in foundation and so unsubstantial as to be devoid of all merit, and frivolous. And such question may have been so explicitly disposed of by prior decisions as to afford no basis for controversy. Futhermore, the supreme court will not undertake to determine moot questions, even with the consent of the parties."

And again in 1 Ruling Case Law, page 317, it is said:

"A cause of action must relate to a real controversy. Courts do not sit for the purpose of determining speculative and abstract questions of law, or laying down rules for the future conduct of individuals in their business and social relations; but are confined in their judicial action to

> real controversies wherein the legal rights of parties are necessarily involved and can be conclusively determined."

Many other cases could be cited to sustain the contention of appellee that when appellant voluntarily put this reduction into effect, there is nothing here for the court to consider, and either the judgment must be reversed with directions for the District Court to dismiss the bills, or the appeal should be dismissed here. These companies litigated this question clear to the Supreme Court of the United States and the decision was against them. It became *res adjudicata* and when they went into the District Court to ask for an injunction to again litigate the same matter, it was rightfully refused. The court held that their petitions failed to state any cause of action and that they had bound themselves by their stipulation and would not be allowed to violate it. This court, under such circumstances, will not assume jurisdiction, but will dismiss the appeal.

It may be that appellant will say that it put this full reduction in effect under protest and for the reason that it was afraid of being penalized. The rule is universal in America that when a carrier in good faith is litigating the confiscatory effect of a reduction order, all penalties are suspended and it is immune therefrom. Otherwise, the doors of the court would be closed to a litigant desiring in good faith to question a reduction.

As a matter of fact there is no merit to appellant's contention that this reduction order, effective November 15, 1922, did not become effective until the first of February, 1928, when it is said the Superintendent of In-

surance designated classes. The lower court held with appellant on this point, but the matter was not fully presented because not thought important in that litigation. It was an afterthought to appellant because, although it filed its petition for a temporary injunction on February 14, 1928 (R. 1), this thought did not occur to it until it amended its bill on March 29, 1928. (R. 4).

Under the Missouri Rating Act the State has authority to regulate fire, lightning, hail and windstorm insurance, and nothing else. On October 9, 1922, the Insurance Department, after a full hearing, ordered a reduction "in the rates now charged by the aforesaid companies on fire, lightning, hail and windstorm insurance business written in the State of Missouri," effective November 15, 1922 (R. 5).

It is true that in the same order the Superintendent requested the companies to "submit a class or classes, which meets the approval of the Superintendent of Insurance." Also under Section 6283, Revised Statutes of Missouri, 1919, it is provided that if the companies do not designate such classes, the superintendent will. Obviously, the superintendent did designate the classes of fire, lightning, hail and windstorm. To say that they could have been more definitely stated is without merit. Appellant and other companies thereupon went into the State Circuit Court and secured an injunction, or an order amounting to the same thing, against the Insurance Department to prevent it from putting such 10 per cent reduction order in effect, and thereafter the matter was litigated clear to the Supreme

Court of the United States. After appellant went into the State Circuit Court there was nothing more the Insurance Department could do, and appellant cannot profit by its own wrongful failure and refusal to designate such classes, if such designation was necessary. The Insurance Department could not designate because it had already done so, and was enjoined by the court. Appellant did not designate and when, on February 1, 1928, the superintendent called its attention to such reduction, it clearly dates back to November 15, 1922.

The Supreme Court of Missouri passed on this exact question in the case of *State ex rel. Hyde, Superintendent*, v. *Westhues, Judge*, 290 S. W. l. c. 448:

> "The 10 per cent reduction order of October 9, 1922, was never revoked by the superintendent of insurance; *it was not suspended or superseded by the institution of the suit to cancel and set it aside.* Notwithstanding the pendency of such action, *it was in full force and effect on November* 9, 1923, when the 15 per cent reduction order was made. The latter order read:
>
> > 'I have this day ordered a reduction of 15 per cent in rates now authorized by the Missouri Inspection Bureau and being collected by the aforesaid (insurance) companies.'
>
> "It did not in terms displace the order of October 9, 1922; in legal contemplation it did not do so. It effected, if anything, another and further reduction—to the extent of 5 per cent—in the rates. It was, therefore, a distinct and independent order, having no relation to or bearing upon the order then under review in the Aetna case."

The reduction order was effective November 15, 1922, as to all companies and the superintendent had no

authority to designate another day and did not attempt to do so. If this court cares to go into this question, it will have no difficulty in arriving at the conclusion that the effective date of such reduction order was November 15, 1922, as to all companies.

Appellant says that the case of *Banton* v. *Belt Line Ry.*, 268 U. S. 413, allows it to voluntarily put a rate reduction in effect and then to contest the validity of such reduction as to past experience. The case does not so hold. There many lines were involved and the company concluded to attack an order relating to certain of its lines. All this court held was that "it was not bound to attack the prescribed rates as to all the routes," and that "the effect of the injunction on the business of the Third Avenue Company and its competitors is not involved in this suit," meaning thereby of course that when a carrier puts a reduction in effect as to certain lines, it may litigate the effect of such reduction as to other lines, but those lines on which a reduction has been put in effect are not involved in the hearing.

In this case the total reduction was voluntarily put in effect by appellant after its appeal to this court. All matters of the past are thereby closed. If appellant desires to litigate the future effect of this reduction it should, under the Missouri statute, apply for an increase of rates, and it cannot be assumed that the Insurance Department will not fairly hear its application and fairly decide same. If the decision is against it, it may then resort to the courts regarding the future effect of the then effective rate. In this case appellant

voluntarily put this reduction in effect and wishes to still litigate the confiscatory nature of such reduction as to its past experience. This it cannot do. It has become a moot question in this court and the appeal should be dismissed.

The Banton case, *supra*, instead of being an authority for appellant, is a very decided authority for appellees. A suit filed to enjoin the enforcement of an order prescribing five-cent fare on certain lines of railway in New York City. As to certain other lines no injunction was sought. This court held that the street railway was not compelled to litigate the confiscatory effect of this order as to certain of its lines unless it wanted to. As to those lines it could accept the order and put the rate in effect. As to other lines it could contest the confiscatory effect of such reduced rate.

In this case the Insurance Department ordered a reduction of 10 per cent in fire insurance rates on all fire, lightning, hail and windstorm risks. Had appellant voluntarily put this reduction order in effect as to fire insurance, it could still have litigated its confiscatory effect as to lightning, hail and windstorm insurance. Under such circumstances the situation would be the same as in the Banton case, *supra*, but when appellant voluntarily put this reduction in effect as to all classes, that is, fire, lightning, hail and windstorm, then it cannot litigate its confiscatory effect, particularly as to its past experience. The question becomes a moot one, and this court will not pass upon the effect of this reduction.

II.

The three-judge court in this case rightfully held that it would not consider the granting of a temporary injunction until restitution was made of this money wrongfully collected and retained because of a stipulation agreeing to refund same. The maxim of "He who seeks equity must do equity" was properly upheld.

In 1922 the Insurance Department of Missouri, after a full hearing, ordered a reduction of 10 per cent in fire insurance rates, effective November 15, 1922. All companies had stipulated that after such reduction was ordered they would proceed through the state courts and to the Supreme Court of the United States, and if the decision was against them, they would make full restitution. (R. 85.)

They proceeded through the State Circuit Court and the Supreme Court of Missouri, and that court sustained the reduction order. (*Aetna Insurance Company* v. *Hyde,* 315 Mo. 13; 285 S. W. l. c. 78.) They then went to the Supreme Court of the United States by certiorari and that court refused to disturb such finding. (*Aetna Insurance Company* v. *Hyde,* 275 U. S. 440.)

Appellant and all other companies then proceeded to file separate suits in the District Court for the Western District of Missouri and asked another injunction against the state officers to prohibit such reduction from going into effect after it had been passed upon by the Supreme Court of Missouri and this court. A three-judge court was assembled and denied appellant an injunction because of its refusal to make restitution, as it had agreed to do. The court also held that the

bill failed to sate a cause of action because not fully disclosing the experience of the companies.

One of the oldest and most familiar maxims in equity is "he who seeks equity must do equity." The District Court held that it could not grant a temporary injunction because of the failure of all of these insurance companies to comply with their stipulation and make restitution. It is unconscionable and unthinkable that these same companies can again litigate this same question and keep all of these excess premiums which they wrongfully collected under an order of the court, which has since been set aside. The rule is universal throughout America that where one receives something from another under an order of a court, and later that order is set aside, restitution must be made of all that was received under such order.

The District Court refused a temporary injunction as to one hundred and fourteen companies, of which appellant is one, and in stating the rule that appellant cannot violate the plain terms of a stipulation and at the same time ask relief and in announcing the doctrine contended for, said (R. 108, 109):

> "Even if they could not begin an entirely new and different attack upon the order of reduction such condition would not meet the claim of defendants that they are coming into a court of equity with unclean hands because they stand as beneficiaries under a stipulation respecting this very matter and which they refuse to carry out. We think this position of defendants is well taken. The underlying principle in the equitable rule of 'unclean hands' is that a court of conscience will not grant relief to one who, at the time, is acting inequitably in connection with the subject-matter of

the controversy. We express no opinion thereon but it may be that the stipulation was not intended to or that it could not prevent the complainants bringing separate actions to attack the reduction order, either through invalidity of the statutes upon which power to make the order must rest or through defects inhering in the particular order, but the facts remain that the stipulation required repayment of the excess collections if a particular stipulated proceeding resulted adversely to these complainants; that such result occurred; that every benefit to complainants from the stipulation has been received by them; that those benefits are very substantial and that they refuse to refund. Unless they do so, they will rob the other parties to the stipulation of every possible benefit therefrom, although such parties have fully performed the stipulation upon their part. Such action by the complainants is highly unconscionable and should not be permitted by a court of equity. It is analogous to that of parties to a contract where the complainants seek to act upon a rescission of the contract while retaining substantial fruits thereof. There, a court of equity will compel a restoration of the *status quo* before examining the rights of the parties. Here, the complainants are seeking to avoid the effect of the stipulation while retaining every substantial benefit (Fol. 125) thereof. They should comply with the stipulation and make the refunds required thereby before asking any equitable relief. When that status has been fully established they will be in position to proceed to have their rights determined and protected and not before.

It is argued that to require this repayment would result in injustice to these companies if it should be determined later that the order was confiscatory as to them or any of them, because it would be impossible ever to recover back the repayments thus made to the policyholders. It is probable that such recovery would be impossible

or, at any rate, highly improbable. But such result is no reason for granting the injunctions. If that is the result, it is one which they have voluntarily brought upon themselves. It does not excuse them nor justify this court in disregarding a basic prerequisite to the exercise of equitable powers. The so-called 'rule of convenience' which leads courts of equity to preserve a status until the rights of the parties can be determined has no application here. The situation here is that equity will not move to protect the rights of a party until that party has placed itself in a position where it can ask a court of equity for such protection. As to each of these complainants who were parties to the stipulation the prayer for temporary injunction should be denied without prejudice to renewal upon a showing of the above refund by the particular complainant seeking such renewal."

The court properly refused a temporary injunction because (a) appellant had stipulated to make restitution in case the decision was against it and, having failed and refused to do so, it was entitled to no relief; (b) regardless of the stipulation, it was the duty of appellant to refund all excess premiums collected under an order of the court, which was later set aside.

Even had there been no stipulation in this case, the rule would have been the same. Appellant and all other fire insurance companies in Missouri collected more than twelve million dollars in excess premiums, and later on when the reduction order was sustained by the Supreme Court of Missouri and undisturbed by the Supreme Court of the United States, there was nothing to do but to make restitution. Having failed to make restitution, it is difficult to understand why appellant figures that it is entitled to litigate this

question again and still retain the money wrongfully collected. The injunction was denied only until and at such a time as restitution was made. After it has been made appellant may renew its application for a temporary injunction as to its future experience.

It was admitted by these insurance companies that they wrongfully retained this money due the policy-holders and it naturally follows that the District Court was without jurisdiction to issue a temporary injunction, and should not in good conscience have done so without first requiring them to make restitution. In *West Texas Loan Company, et al.* v. *Beckham,* 201 S. W. l. c. 583, the Court of Appeals of Texas, in so holding, said:

> "It has likewise been held that, where plaintiff admits a sum of money to be due or equitably due to defendant, his petition must show that he has paid or offered to pay, or must contain an averment of his willingness to pay such sum of money to entitle him to relief by injunction. 32 C. J. p. 334; *Spann* v. *Sterns,* 18 Tex. 556; *Weaver* v. *Nugent,* 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; *Carden* v. *Short,* (Tex. Civ. App.) 31 S. W. 246; *Carr* v. *Foelich et al.,* (Tex. Civ. App.) 220 S. W. 137 (error refused)."

21 C. J., page 172, in announcing that one who seeks equity must do equity, says:

> "He who seeks equity must do equity. The maxim expresses a cardinal principle, and is one of the oldest in equity jurisprudence. It is of most extensive application, being applicable to all classes of cases whenever necessary to promote justice."

This appellant is not entitled to any relief until it first makes restitution of that which it is wrong-

fully withholding from the policyholders in Missouri, which it secured under an order of the court which has since been set aside. In *United States* v. *Trinidad Coal and Coking Company,* 137 U. S. l. c. 171, the court said:

> "Let the wrongdoer first restore what it confesses to have obtained from the government by means of a fraudulent scheme formed by its officers, stockholders and employees in violation of law."

In the famous oil case, *Pan American Company* v. *United States,* 273 U. S. 456, the owners of the lease contended that they should be allowed, in the way of a return, all the money which they expended on the lease, but the court having found that they corruptly and illegally bribed the Secretary of the Interior into letting them have these leases, refused to adopt this principle in their behalf, but in announcing the rule, in no uncertain terms, at page 505, said:

> "In suits brought by individuals for rescission of contracts the maxim that he who seeks equity must do equity is generally applied, so that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. 'The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction.' *Neblett* v. *Macfarland,* 92 U. S. 101, 103. And, while the perpetrator of the fraud has no standing to rescind, he is not regarded as an outlaw; and, if the transaction is rescinded by one who has the right to do so, 'the courts will endeavor to do substantial justice so far as is con-

> sistent with adherence to law.' *Stoffela* v. *Nugent*, 217 U. S. 490, 501. The general principles of equity are applicable in a suit by the United States to secure the cancellation of a conveyance or the rescission of a contract. *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 339; *United States* v. *Stinson*, 197 U. S. 200, 204; *State of Iowa* v. *Carr*, 191 Fed. 257, 266; cf. *Mason* v. *United States*, 260 U. S. 545, 557, *et seq.* But they will not be applied to frustrate the purpose of its laws or to thwart public policy."

In holding that a court of equity should not grant an injunction until the parties are restored to their former positions, Mr. Justice Miller in *Thomas, Trustee* v. *Brownville, Fort Kearney, and Pacific Railroad Company*, 109 U. S. l. c. 526, said:

> "In this condition of the case they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these intervenors to defeat the mortgage on any other terms would be unjust, and would make the court the instrument of this injustice."

Under an order of the Circuit Court of Cole County, these insurance companies collected more than $12,000,000 from policyholders in Missouri in the way of excess premiums and when the highest court of the land set aside the order, it was the duty of these insurance companies to make immediate restitution of this sum, and the Supreme Court of the United States, in

the case of *Neblett* v. *Macfarland,* 92 U. S. 103, in laying down the rule that restitution must be made, at page 103 said:

> "In cases of this character the general principle is, that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction. *Bellamy* v. *Sabine,* 2 Phil. 425; *Samy* v. *King,* 5 H. L. 627; *W. B. of Scotland* v. *Addie,* L. R. 1 Scotch App. Cas. 162; *Gatley* v. *Newell,* 9 Ind. 572; *Johnson* v. *Jones,* 13 Sm. & M. 580; Kerr on Fraud, 335, 343. This is, no doubt, the general rule."

In holding that one who seeks the aid of equity must pay for the value of work done, Chief Justice Smyth of the Supreme Court of the District of Columbia, in *Talbott* v. *Hill, et al.,* 261 Fed. l. c. 246, said:

> "The question would then arise as to whether or not Talbott could invoke the aid of equity for the purpose of discharging the security of his creditor while the debt remains unpaid. It is a maxim of equity that he who seeks equity must do equity. *Knox* v. *Gaddis,* 1 App. D. C. 341; *Buchanan* v. *Macfarland,* 31 App. D. C. 6, 21; *Thomas* v. *Brownsville, etc. R. R. Co.,* 109 U. S. 522, 526, 3 Sup. Ct. 315, 27 L. Ed. 1018; *Neblett* v. *Macfarland,* 92 U. S. 101, 103, 23 L. Ed. 471. In the Thomas case the company gave a mortgage to secure the payment of bonds which it had issued to certain persons who had contracted to build its road. The bonds not having been paid when they became due foreclosure was com-

menced. A defense was made on the ground that the contract on account of which the bonds were issued was fraudulent and void, foreclosure was resisted, and the court was asked to set aside the mortgage. It appeared that those claiming under the mortgage had done a certain amount of construction work for the company. The court, applying the principle that he who seeks the aid of equity must do equity, held that the company was bound to pay the value of the work done before it could have the relief prayed. To the same effect are *Driver, Adm'r* v. *Hudspeth,* 16 Ala. 348; *Merriam* v. *Goodlett et al.,* 36 Neb. 384, 54 N. W. 686; *Booth et al.* v. *Hoskins,* 75 Cal. 271, 17 Pac. 225; *Gage* v. *Riverside Trust Co.,* (C. C.) 86 Fed. 984. Talbott, in praying the court to free his property from the lien, without first paying or offering to pay the debt justly due, is certainly not doing equity, but rather seeking its aid in the perpetration of a wrong. Manifestly his request must be denied."

In holding that before one is entitled to an injunction he must himself discharge his own obligations to the plaintiff, the Circuit Court of Appeals for the Third Circuit, in an opinion by Davis, J., *Fullman* v. *Steel City Electric Co.,* 2 Fed. (2d Ed.) 4, l. c. 6, said:

"While the defendant has the right to have the court decree that title to the invention and letters patent is in it, and to require plaintiff to assign his right, title and interest in and to the patent to it, yet, before it can demand that its rights be enforced, it must discharge its own obligations to the plaintiff, by paying the expenses incurred by him in securing the patent.

"Pervading the administration of equity in all its branches are certain broad principles, so generally accepted and of such fundamental character that they have become known as maxims.

> One of the oldest and most venerable of these is that 'he who seeks equity must do equity.' *Hanson* v. *Neal*, 215 Mo. 256, 273, 114 S. W. 1073, 1078. It applies to one who affirmatively seeks equitable relief (*Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, 662, 31 S. Ct. 105, 54 L. Ed. 1193), but it is as appropriate to the conduct of the defendant as to that of the complainant (*Brown, B. & Co.* v. *Lake Superior Iron Co.*, 134 U. S. 530, 535, 10 S. Ct. 604, 33 L. Ed. 1021), and it should be applied in every case where its application is necessary in order to do justice (*Mutual Benefit Life Insurance Co.* v. *Brown*, 30 N. J. Eq. 193, 199). Having jurisdiction of this case on appeal, it is our duty and in our power to require the payment of these expenses. *Potter* v. *Beal*, 50 F. 860, 864, 2 C. C. A. 60."

The Supreme Court of Rhode Island in *Moncrief* v. *Palmer*, 114 Atl. 181; 17 A. L. R., l. c. 120, in holding that one must discharge his own obligations before appealing to a court of equity, said:

> "Whatever may be the method adopted by the legislature, however, although the legislative provision may go to the limit of our statute and declare the contract void and unenforceable, nevertheless courts of equity, in the absence of statute specifically contraining them to act differently, have insisted upon the equitable principle that he 'who seeks equity must do equity,' and have required the borrower, before he can be given the relief of cancellation of the contract, to perform the moral obligation resting upon him, and pay or offer to pay the principal of the loan with legal interest."

Since the decision of the Supreme Court of Missouri, and undisturbed by the Supreme Court of the United States between these same parties, *Aetna In-*

surance Company, et al. v. *Hyde,* 315 Mo. 13, these premiums collected in excess of the legal rate by these insurance companies are being wrongfully withheld from the policyholders, and in holding that these plaintiffs are not entitled to appeal to a court of equity without first making restitution, the Supreme Court of Washington in *Langley* v. *Devlin, et al.,* 163 Pac. 395; 4 A. L. R. 1. c. 42, said:

> "Respondents were put in no worse position by the alleged fraudulent acts of the appellants. On the contrary, they profited by them. The maxims, 'He who comes into equity must come with clean hands,' or, after suit is brought 'He who seeks equity must do equity,' mean no more than that he who has defrauded his adversary to his injury in the subject matter of the action will not be heard to assert a right in equity. Respondents have not been misled or overreached. By no act of appellants have they been worsted. In the application of principles it is important that we do not put one principle at war with another. While the courts will not, as a rule, measure equities between wrongdoers, they are quite as careful to deny to any man the advantage of his own wrong."

We will show under another point in this brief that these insurance companies cannot again litigate this experience which has been litigated. It is, to the whole world, a closed matter. It naturally follows, therefore, that restitution must be made up to the end of this period when the Supreme Court of the United States refused to disturb the opinion of the Supreme Court of Missouri. Until such restitution is made, these plaintiffs are in no position to come before a court of equity and ask relief. If they make

restitution and then desire to litigate the effect of this reduction in the future, or from now on, it may be that they can state an equitable case, but they certainly cannot state a case in equity while retaining all of this money wrongfully taken from these policyholders.

The late Judge Sherwood of the Missouri Supreme Court was very clear in all of his expressions and in *Kline* v. *Vogel*, 90 Mo. 239, in dealing with an equitable proceeding, asking the setting aside of a sale and an accounting for rents and profits, in applying the principle now contended for, at page 245 said:

> "And this being a proceeding in equity, will be governed by rules and principles prevalent in those courts where relief of that character is prayed. Among these rules, having application here, is one to be presently mentioned. The true meaning of the rule, whose frequency of invocation would seemingly argue a better knowledge of its import, that 'he who seeks equity must do equity,' is simply this: that where a complainant comes before a court of conscience invoking its aid, such aid will not be granted except upon equitable terms. These terms will be imposed as the price of the decree it gives him. The rule 'decides nothing in itself,' for you must first inquire what are the equities which the plaintiff must do in order to entitle him to the relief he seeks. *Hanson* v. *Keating*, 4 Hare, 1; *Neesom* v. *Clarkson, Id.*, 97; *Phillips* v. *Phillips*, 50 Mo. 603; *Erwin* v. *Blake*, 8 Pet. 18; Story Eq. Jur., Sec. 64, and cases cited. Thus, where a husband comes into a court of equity for relief as to any property of his wife, which he claims *jure mariti*, he will be obliged to submit to the terms of the court by making suitable provision for her, or else

assistance will be denied him. So, also, if a borrower of money on usurious interest seeks the cancellation of the instrument which evidences the debt, equity refuses its aid unless upon the condition that payment be made the lender of what is *bona fide* due him. The above are only a few out of a large number of examples which might be cited in illustration of the rule referred to, which finds its application not in questions of pleading nor by what the plaintiff offers to do therein, but in the form and frame of the orders and decrees, both interlocutory and final, whereby equitable terms are imposed as a condition precedent to equitable relief granted."

And at page 247, in holding that the maxim contended for relates to performance, just what we are asking in this case, said:

"Very often the case is so complicated, the equities involved therein so uncertain, that they can by no possibility be ascertained until after the most painstaking investigation by the chancellor. To require, therefore, that a plaintiff, in order to make his pleading good, in order to prevent his being sent out of court on account of a defective pleading, he should be compelled to do what the unascertained and unascertainable equities of his case demand, seems altogether unreasonable. The true theory of the maxim, 'he who seeks equity must do equity,' is not a question of pleading, but a question of performance—performance by the complainant of those conditions which a court of equity imposes 'as the price of the decree it gives him.'"

Restitution Must be Made.

There is no better settled principle of law than that where one receives something under an order of a court, which is later reversed, restitution must

be made of all that has been received under it. On such reversal the law raises an implied obligation or agreement on the part of the party securing the judgment or decree to restore all that has been obtained directly or indirectly by means of the same. The principle is fundamental and there could be no justice without it.

In 3 Cyc. 462, the rule is stated as follows:

> "It is the general rule that when a judgment, order or decree of the lower court has been reversed or vacated by the appellate court, *restitution will be made to the party aggrieved of all property and rights which he has lost by reason of such erroneous judgment, order, or decree,* and it is no reason for denying such restitution to the party aggrieved that the money was received by the other party in good faith."

In 18 Encyc. of Pl. & Pr. 781, the rule is thus stated:

> "Where a judgment or decree of an inferior court is reversed by a final judgment in a court of review, a party is in general *entitled to restitution of all things lost by reason of the judgment in the lower court* and accordingly the courts will, where justice requires it, promptly and as far as practicable place him as nearly as may be in the same condition he stood in previously."

In *Gott* v. *Powell,* 41 Mo. 416, the court states the doctrine, on page 420, as follows:

> "*The restitution to which the party is entitled upon the reversal of an erroneous judgment is everything which is still in the possession of his adversary.* Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterwards reversed, so far

as he is concerned his title is at an end, and the land or goods must be restored in specie—not the value of them, but the things themselves."

In *Railroad Co.* v. *Brown*, 43 Mo. 294, the doctrine again is clearly announced and adhered to, where it is held as follows:

"Where a judgment was reversed in the Supreme Court, and declared to be null and void, all of the proceedings had in pursuance of that judgment were vacated, and *defendant was entitled to be restored to the condition in which he stood previous to the judgment, and to restitution of everything that he had lost and which remained in the hands of the adverse party, his agent, attorneys, or privies;* and no suit is required to set aside a deed of land bought by an attorney of plaintiff in such judgment upon execution sale of defendant's property."

No stronger statement of the doctrine now contended for by the state can be found anywhere than appears in the decisions of the Supreme Court of the United States. In *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8, 8 L. Ed. 299, there was an action in assumpsit, instituted to recover an amount realized through a judgment, which was afterwards reversed. The Supreme Court of the United States has most emphatically stated the rule and announced the doctrine to be applied, where, among other things, it held as follows:

"On the reversal of an erroneous judgment *the law raises an obligation in the party to the record, who has received the benefit of the judgment, to make restitution to the other party for what he has lost*; and the mode of proceeding to effect this object may be regulated according

to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias* when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias* may be necessary to ascertain what is to be restored. But as it respects third persons, whatever has been done under the judgment, whilst it remained in full force, is valid and binding.

"Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and *the law at the very time of payment creates the obligation to refund it.* A notice to recover back the money does not even in such cases create the right to recover it back; that results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake."

In *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216, 35 L. Ed. 151, *Bank* v. *Bank, supra,* is heartily affirmed, where the court said beginning on page 219:

"The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there, has been as to the proceedings to enforce the restitution. Thus in Anonymous, 2 Salk. 588, it was held by Holt, Ch. J., that 'where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party shall have restitution without a *scire facias,* and there is a certainty of what was lost; otherwise where it was levied but not paid, there must then be a *scire facias* suggesting the matter of fact, viz., the sum levied etc.'

"The same doctrine has been fully recognized by this court in *United States Bank* v. *Bank of*

Washington, 31 U. S. 6 Pet. 817 (8: 299, 304). In that case the court, after observing that the party against whom an erroneous judgment has been enforced does not lose his remedy against the party to the judgment, said:

"'*On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost;* and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias,* when the record shows the money has been paid, and there is a certainty as to what has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. 2 Salk. 587, 588; Tidd's Pract. 936, 1137, 1138. And, no doubt *circumstances may exist where an action may be sustained to recover back the money.*' We are of opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties, the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction."

One of the leading cases on "restitution" is that of *Haebler* v. *Myers,* (N. Y.), 15 L. R. A. 588, in an opinion by Judge Vann:

"Restitution was remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his

appeal. It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed 'that the defendant be restored to all things which he had lost on occasion of the judgment aforesaid.' A writ of restitution was thereupon issued, provided the amount that the appellant had lost or paid under compulsion appeared of record, as by the return of an execution satisfied; otherwise process is the nature of an order to show cause was first issued, known as a '*scire facias quare restitutionam habere non debet.*' Toml. Law. Dict., title Restitution; 2 Lil. Abr. 472; Rolle, Abr. 778; *Westerne* v. *Creswick*, 4 Mod. 161; Wilkinson's case, Cro. Eliz. 465; *Goodyere* v. *Ince Cro. Jac.*, 246; Manning's case, 8 Coke, 94; 2 Tidd. Pr. 1033; 1 Burrill, Pr. 292."

Another leading case on this subject is that of *Hess* v. *Deppen*, 125 Ky. 425, 15 Am. & Eng. Ann. Cas. 670:

"'*When a judgment is reversed, restitution must be made of all that has been received under it; but no further liability should in any case be imposed.*' This case was followed in *Schnabel* v. *Waggener*, 118 Ky. 362, 80 S. W. 1125, 26 Ky. L. Rep. 258: It is also supported by the following authorities: *Mark* v. *Hyatt*, 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275; *Thompson* v. *Reasoner*, 122 Ind. 454, 24 N. E. 223, 7 L. R. A. 495; *Simpson* v. *Hornbeck*, 3 Lans. (N. Y.) 53; *Bryan* v. *Congdon*, 86 Fed. 221, 57 U. S. App. 505, 29 C. C. A. 670; *Fisher* v *Langbein*, 62 How. Pr. (N. Y.) 31, 25, Am. Dec. 598; *Hayden* v. *Shed*, 11 Mass. 500; *Peck* v. *McLean*, 30 N. W. 759, 36 Minn. 228, 1 Am. St. Rep. 665; 3 Cyc. 470; 18 Anc. Pl. & Pr. 884, and cases cited."

This question was also passed upon in a splendid opinion from the Supreme Court of Illinois in the case of *Cummings* v. *Mugge,* 94 Ill. 186, in which the court says:

> "Appellants, by their counsel, claim that the proofs taken show that the lumber in question was their property, and that while they were restrained by the injunction from meddling with the same, appellee wrongfully took and disposed of the same to his own use, and that the necessary expense of collecting and presenting this proof upon the assessment of damages was large; and counsel insist that appellants were entitled by law to have the value of the lumber and these expenses included in the assessment of damages.
>
> *"This position cannot be sustained. The service of the writ of injunction in no way authorized or caused the wrongful act of appellee in taking and converting the property.* The dismissal of the bill and the dissolution of the injunction were conclusive that the injunction was wrongfully sued out."

A very clear opinion holding that these policy-holders are entitled to restitution is the case of *Southern Railway* v. *Com'rs,* 196 Fed. 558:

> "Legally speaking, a rate statute must be held good until it is shown by the proof, as applied to a particular carrier, that the statute will prevent a fair and reasonable return upon the value of the property employed in the service, and until that is shown the rate statute must be held to be *prima facie* valid, and if it be afterwards repealed, shippers and passengers, as to transactions completed while it was in force, in the absence of a judicial condemnation of the rates, *have a vested right of action against the carrier for any excess charges above those allowed by the repealed statute while it was in force. Central of Georgia Railway Co.* v. *Railroad Commission of Alabama et al.,* (C. C.) 161 Fed. 979."

In *Brown* v. *Detroit Trust Company,* 193 Fed. 622, the Circuit Court of Appeals for the Sixth Circuit again stated the doctine to be applied, where it said at page 626:

> "Certainly, if restitution is possible, the judgment appealed from would be affected by the reversal. In the courts of the United States the rule is broadly settled that upon the reversal of an erroneous judgment *the law raises an obligation in the party to the record who has received the benefit of the judgment to make restitution to the other party for what he has lost,* and that the mode of effecting this result may be regulated according to circumstances. See *Bank of United States* v. *Bank of Washington,* 6 Pet. 8, 8 L. Ed. 299; *Ex Parte Morris* v. *Johnson,* 9 Wall. 605, 19 L. Ed. 799; *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216, 221, 11 Sup. Ct. 523, 35 L. Ed. 151."

The Missouri Supreme Court, after dismissing the petition of all of these insurance companies, upon holding the rate reduction order valid, retained jurisdiction to make any and all further orders it might desire. Such orders, of course, will provide for restitution, and a very clear statement of the rule allowing that court to proceed toward restitution, may be found in the case of *Railroad Company* v. *Barker,* 210 Fed. Rep. 902. Beginning at page 914, Judge McPherson said:

> "There have been many of these public utility rate cases before the courts, and in some of them there have been mere naked dismissals of the bills of complaint followed by a judgment for costs, but without other recitals in the decrees, nothing added and nothing subtracted. Such was done, as I understand, it in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511. In the Arkansas Rate Cases, 230 U. S. 553, 33 Sup. Ct.

1030, 57 L. Ed. 1625, which are very much like these 13 cases, the court retained jurisdiction to the exclusion of the state courts for the purpose of ascertaining to whom and in what sums moneys were due because of rates paid during the life of the injunction beyond those allowed by the statute. I have before me the opinion by Judge Trieber of the Eastern District of Arkansas, filed within the past ten days. Judge Trieber discusses many questions in that opinion, reaching conclusions in nowise controlling here. In the Arkansas Rate Cases bonds in penalties of $1,000,000 were conditioned as follows:

" 'If it should eventually be decided that so much of this order as inhibits enforcement of the rates prescribed * * * that the complainant shall refund to the owners and holders of the certificates issued by it (showing the excess payments) the excess charges as shown by the same.'

"Judge Trieber was expressly adjudicating the effect of the bonds before him. The rule is that the court can retain the bonds and have all liabilities thereunder adjudicated, or the court may remit the same to another court. In other words, these bonds in Judge Trieber's cases were precisely one and the same as if a deposit of moneys had been required and placed in the registry of his court to reimburse all those who had paid fares beyond that which would have been reasonable or beyond rates fixed by statute. Such is Judge Trieber's opinion.

"The Supreme Court of the United States but a few weeks since (*City of Louisville* v. *Cumberland Telephone & Telegraph Co.*, 231 U. S. 652, 34 Sup. Ct. 260, 58 L. Ed. ....., January 5, 1914) was dealing with a case much like the Arkansas Rate Cases. An ordinance of the City of Louisville had been adopted fixing telephone rates. The trial court held that the rates thus fixed were confiscatory. On appeal the decree of the District Court was reversed. *Louisville* v. *Telephone Co.*, 225 U. S. 430, 32 Sup. Ct. 741, 56 L. Ed. 1151. The opinion concludes by directing 'Decree reversed without prejudice.' The

mandate required the District Court to proceed 'for further proceeding not inconsistent with the opinion of this court.' The trial court, after this mandate was filed, entered an order dismissing the case but retaining the same on the docket for the purpose of ascertaining the amounts collected by the company from its patrons in excess of the rates prescribed by the ordinance, and for the further purpose of distributing the same among the persons entitled thereto. During the progress of that case in the trial court, the city moved for an order requiring the company to pay into court all sums collected in excess of those rates fixed in the ordinance. To avoid that order and such deposit of money, the company agreed that, if the court would make no order, it (the company) would keep an accurate account of the sums collected on the rates fixed, and would on the final hearing pay the amounts into court for distribution among those entitled thereto, in the event the ordinance was not declared to be confiscatory. By reason thereof the court made no order requiring a deposit. In short, the proceedings of the trial court in the first instance was that the order for depositing the excess would not be made; the company agreeing to have the court ascertain the amount and then pay it into court for distribution. Such was part of the proceedings agreed to by both parties, and such was at the bottom of the opinion of the Supreme Court, as above cited. The trial court, after mandate was filed, proceeded to carry out this agreement, and an application for mandamus was made and denied by the Supreme Court of the United States but a few weeks since. The Supreme Court held that the trial court did not abuse its discretion on the whole record by having an accounting made in the court and requiring the amount found by the accounting to be paid into court and distributed.

"Litigation like this arose in West Virginia. The proceedings there were in the state court. The court required coupons to be issued evidencing such

excess fares thus paid. The Supreme Court of the state having held the act was constitutional, the case was affirmed by the Supreme Court of the United States in *Chesapeake & O. R. Co.* v. *Conley*, 230 U. S. 513, 33 Sup. Ct. 985, 57 L. Ed. 1579. After the mandate of the Supreme Court of the United States was filed with the Supreme Court of the state, and the Supreme Court of the state certified the proceedings to the trial court, then the trial court decided that the moneys represented by these coupons should be gathered in by the court and distributed to the holders of such coupons

"*Russell* v. *Farley*, 105 U. S. 433, 26 L. Ed. 1060, is a case strongly urged in support of the contention that this court should appoint a master and assess the amounts of excess fares and distribute them. That case presented a controversy between the receivers of a railroad in the State of Minnesota and certain other parties claiming the right to rails, and perhaps other controversies. The entire contention was with reference to a trust, and as to what property the trust had been or should be impressed. But one party appealed from the decree, and he appealed only from that portion which declared that neither party is entitled to costs or damages. The case was first presented in the state court, and, had it remained there, a Minnesota statute would have been sufficient warrant to require the state to hold that the damages could be ascertained by reference or otherwise, as the court should direct. But, the case having been removed from the state court to the United States Court, the Supreme Court held that statute was not applicable. The writer of the opinion, Mr. Justice Bradley, announces the rule to be that, where no bond or undertaking has been required, the court has no power to award damages sustained by either party in consequence of litigation, except by making such decree with reference to the costs as it may deem equitable and just. But that case is with reference to assessment of damages *between parties*

to the record, and there was no other proposition before the court. I cannot reach the conclusion that that case is an authority upon the question now before this court. Commencing 24 years ago in the case of *Milwaukee Railroad Co.* v. *Minnesota,* 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970 and continuing until the present time, there has been a uniform line of holdings that the fixing of rates is a legislative act, and in determining the question of whether rates thus fixed are remunerative or not is a judicial question. The further holdings are that the only appropriate way to determine such matters is to bring into the record such officers as have the enforcement of the legislative act as part of their duties.

"In the case at bar the state officers, charged with the enforcement of the statute, were made parties defendant. For a time one individual shipper and an individual passenger were joined as defendants as supposed representatives of a class, but they were dismissed from the case, and, when these cases went to decree, the decree was only as between the railway company and the state officers. Shortly after the cases were commenced, this court, Judge Philips presiding, exacted and approved a bond of the railway company in the penal sum of $10,000. After reciting the order the bond reads:

" 'Now, if said obligor pays, in case said injunction be dissolved, all damages ascertained herein to have been sustained by the defendants or any of them, or any person becoming a defendant herein, then this obligation to be void; otherwise in force and effect.'

"There was no other bond and no other requirement. And from the date of the filing of that bond, July 22, 1905, parties on both sides acquiesced therein, and by such acquiescence neither party can say that the bond is to be construed otherwise than on its face, and courts both of law and of equity will consider the same in the language only in which it was given. The bond, it will be noticed, is to pay

damages *that the defendants or any of them, or any person becoming a defendant, may sustain.* There is not a word in the bond *with reference to shippers and passengers,* and the terms of the bond will admit of no such construction. Therefore, for several years, with the consent of all parties to the record, the case proceeded *as if there were no bond other than to reimburse the defendants to the record for such damages as they might sustain.* There is nothing for shippers and passengers to adopt by pleading said bond, and *there is nothing for the railway companies to assert against the passenger or shipper by reason of that bond.* Neither party asked that the excess rates or fares be impounded or paid into the registry of the court or controlled in any way whatsoever. So that, in my opinion, there is nothing left for consideration except a mere money demand in the nature of an action for money had and received. And it can be fairly stated that in every case where the court, sometimes on the motion of the public and sometimes on the motion of the public utility, has compelled all parties to come into court upon a state of facts showing that there was some kind of a trust to be observed and enforced, or with the property in some way or other before the court for distribution. In some instances this trust has been in the nature of a bond taken by the court for the payment of such specific damages; sometimes by the agreement of the parties; sometimes with coupons taken; and sometimes with money in the registry of the court."

An interesting case on this subject is that of *City of St. Louis* v. *St. Louis Gaslight Company,* 70 Mo. 69, where the Supreme Court of Missouri reversed the action of the trial court and dissolved the injunction. It will be observed, however, in examining the opinion in this case, that the Supreme Court required the plaintiff to do the very thing which we now insist these insurance

companies should do, and at page 121, the court, in reversing the lower court's decision, required as follows:

> "We, therefore, reverse the judgment and remand the cause, with directions to the circuit court to make a rule or order directing and requiring the receiver, appointed by the decree, *to restore to the possession of defendant the gas works and all property, real and personal, by him received in virtue of said decree, together with the profits derived therefrom;* that he report his action to said court, upon approval of which the bill shall be dismissed."

The decision of the District Court is so clear on this point that we are unable to add anything to it. The temporary injunction was denied and properly so for the reasons given.

Relator apparently relies upon the case of *State ex rel. Hyde* v. *Westhues, Judge,* 316 Mo. 457; 290 S. W. 443, for its authority for retaining excess premiums after the order allowing such collection was set aside. This case is no authority on this point. It simply holds that under an order of the court embodying the stipulation in question, these collections were made. It naturally follows that when such order was set aside the only thing appellant could do was to make restitution of everything received under such order. The lower court in this case simply held that when these insurance companies stipulated with the State, they were bound by such stipulation. Both parties followed the stipulation and great benefits were granted appellant and all other companies by reason of such stipulation. Having received the benefits of it, they are in no position to now attempt to repudiate it.

Relator contends, however, that such stipulation relates only to procedure, but the decision of Judge Stone is so analytical of this stipulation that it is difficult to add anything to it. These companies signed this stipulation and should be bound by it. It inevitably follows that the decision on this point was right and the gravest injustice would be done the State of Missouri to allow appellant to accept the fruits of this stipulation and collect more than twelve million dollars by virtue of it, and then be allowed to repudiate such stipulation and not refund such money wrongfully and illegally retained.

There is no merit to appellant's contention that as this stipulation was signed by all of these insurance companies, including appellant, they are not individually bound by it. Since when did it become the rule that two people may sign a stipulation and only one of the two is bound? Everyone signing this stipulation was bound and as appellant signed it, it makes no difference whether it signed along with other companies or by itself.

The lower court was right in requiring appellant to comply with its stipulation before asking any relief in a court of equity. This money was wrongfully collected and must be returned. Appellant stipulated to return it and has failed and refused to do so. Until it has done so, it has no right to ask relief, and the court was right in denying same.

III.

The District Court held that all of the petitions for temporary injunction should be dismissed because of the failure to fully disclose the experience of the companies. They submitted their experience on an erroneous and improper basis. The court, after condemning such method and stating that it could very well deny an application for a temporary injunction for such reason, refused to do so, on the theory that such petitions could be amended. Obviously, these petitions do not state any cause of action and no equity is contained in any of them. They failed to inform the court as to the full amount of their income and outgo. One complaining about a confiscatory rate must make full disclosure of its entire business.

No cause of action of any kind was stated in any of these petitions. Appellant states that from 1917 to 1921 inclusive its earned premiums were $2,024,736.00 and that its incurred losses and expenses were $2,330,251.00, or a loss on that method of $305,485.00.

This method of earned premiums and incurred losses on which they asked the District Court to grant an injunction was expressly condemned by every Judge of the Missouri Supreme Court, and does not state actual income or actual outgo of these companies (*Aetna Insurance Company et al.* v. *Hyde, Superintendent*, 285 S. W. l. c. 70, 71, 72).

The District Court, in a very able opinion by Stone, Circuit Judge (R. 118 to 126), so completely analyzed and destroyed the contention of appellant that we deem it unnecessary to add anything to what he said. It is unanswerable.

The petition should have been dismissed because of the failure to fully disclose income and outgo, but

in order to give appellant another chance the court relieved it stating that "ordinarily, the result from such failure would be denial of temporary injunctive relief" (R. 127).

The following cases hold that one alleging confiscation has the burden of proof to show it and that the evidence must be clear, full and convincing, and on this ground alone the District Court was fully justified in refusing to grant a temporary injunction.

The leading case in the United States on this point is *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339. In that case it was agreed that the operating expenses were a certain sum. In refusing to accept such agreement and holding that the duty was on the railroad to show confiscation by its own evidence, Mr. Justice Brewer, at page 345, said:

> "A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates perscribed, secure to the bondholders their interest, and to

the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'

"We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

In this case it clearly appears and the trial court found that appellant had not made full disclosure of its income and outgo, and in holding that under such circumstances it was not entitled to any relief, the Supreme Court of Nebraska, in *State of Nebraska* v. *Adams Express Company,* 85 Neb. 25, 42 L. R. A. (N. S.) l. c. 401, said:

"In concluding the discussion of this question, it must be borne in mind that, where an attempt is made to strike down a rate statute, it is incumbent on the party complaining to make full, fair and complete disclosure. Now, while it appears from a careful reading of the evidence that in many, and perhaps most, things the defendant has made full and fair disclosure, still in some matters it has failed to do so. We find that there is a large sum charged to the intrastate business as expenses of administration. We are

told that this includes the salaries of the defendant's general officers. It appears that the company has declined to state the salary of a single one of such officers, and we are wholly without any knowledge as to the amount, much less the reasonableness, of such salaries. Under a showing of this kind the defendant could, without danger of detection or even adverse criticism, load the Nebraska state business with an expense which would render it so unremunerative as to require us to strike down the act in question. Again, it appears that the defendant is a joint-stock company, and it is fair to presume, in the absence of disclosure and proof to the contrary, that a majority of its stock is held and owned by its officers and directors. In such a case salaries could readily be made so exorbitant, unreasonable, and excessive that, by charging to the intrastate business a proportionate amount thereof, that business would appear to be unremunerative.

"Finally, the evidence shows that the amount paid to the Burlington railroad for transportation for the year 1907 was $159,727.76, or 57.5 per cent of the gross receipts from domestic business. This appears to be a larger percentage than is paid to any other railroad for like services. It may be an entirely proper charge, or it may be an unreasonable exaction, and there is no evidence in the record tending to establish either proposition. Counsel for the defendant assert that its contract with the Burlington railroad was the result of competitive bidding. This may be so, but it is not proved, and, if it were proved, would not establish *per se* the reasonableness of the charge The public is entitled to have its commodities carried at fair rates, and cannot be subjected to excessive charges by any arrangement between the railroad and the express company. If a railroad farms out the express business, it must be on terms that will enable the express carrier to operate at a profit, without imposing excessive

charges upon its patrons. Any contract which will not permit this to be done, whether it be the result of competitive bidding or not, is void in so far as it affects the rights of the public.

"For the foregoing reasons we are of opinion that the defendant has failed to show by competent evidence a fair and full disclosure that the rates in question are confiscatory, and its exceptions upon this point are therefore overruled."

Under no possible theory can appellant sustain its application for an injunction because of its refusal to fully disclose its activities. If other authorities are desired on this question, see:

Mo. Rate Cases, 230 U. S. 474, 33 Sup. Ct. Rep. l. c. 979.
Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 762.
Kansas City Southern Ry. Co. v. *U. S.*, 52 L. R. A. (N. S.) l. c. 51.
Company v. *Lewis*, 180 N. Y. Supp. l. c. 586.
Ark. Rate Cases, 187 Fed. 290.
State v. *Virginia & T. R. Co., et al.*, 24 Nev. 53, 49 Pac. 945.
Smythe v. *Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418.
Union Pacific R. R. Co. v. *U. S.*, 99 U. S. 402.
Consolidated Gas Co. v. *N. Y.*, 157 Fed. 849.
Cedar Rapids Gaslite Co. v. *Cedar Rapids*, 144 Iowa 426, 48 L. R. A. (N. S.) 1025.
Galveston Electric Co. v. *Galveston*, 258 U. S. 388, 42 Sup. Ct. Rep. l. c. 356.
Company v. *Nixon*, 181 N. Y. Supp. 623.
Re North Adams, 27 Mass. G. & E. L. C. R. 17.
Legg v. *Company*, 1 Calif. R. C. R. 11.
In re Freight Rate, 9 I. C. R. 382.
Ill. Cent. R. R. Co. v. *Interstate Commerce Com.*, 206 U. S. 441, 27 Sup. Ct. Rep. 700.

Darnell v. *Edwards*, 244 U. S. 564, 37 Sup. Ct. Rep. 702.
State ex rel. v. *Public Service Commission*, 252 S. W. l. c. 452.
10 C. J. 411, 12, 13, 18.
10 Fletcher Cyc. Cor., pp. 747, 748.

This method of earned premiums and incurred losses, on which the court was called upon to grant an injunction, was expressly condemned by every judge of the Missouri Supreme Court, and does not state the actual income or the actual outgo of these companies. Judge Ragland, after demolishing this method in the same case between these parties, *Aetna Insurance Company, et al.*, v. *Hyde, Superintendent*, 285 S. W. at page 71 said:

> "The stand now taken by them has the appearance, therefore, of having been contrived by ingenious counsel, or by possibly more ingenious insurance accountants, for the purposes of this case."

What we contend is this: That in asking this court for an injunction, it was the duty of these insurance companies to fully and completely disclose to this court all of their income and all of their outgo. This they have not done and this court can not grant them any relief. We are not going, at this time, to enter into a discussion of the earned premium basis and the premium received basis, because the Missouri opinion is so full and complete that we are unable to add anything to it. This court will have no trouble, after reading that opinion, in finding that this method now presented to this court, of earned premiums, was invented for this

charges upon its patrons. Any contract which will not permit this to be done, whether it be the result of competitive bidding or not, is void in so far as it affects the rights of the public.

"For the foregoing reasons we are of opinion that the defendant has failed to show by competent evidence a fair and full disclosure that the rates in question are confiscatory, and its exceptions upon this point are therefore overruled."

Under no possible theory can appellant sustain its application for an injunction because of its refusal to fully disclose its activities. If other authorities are desired on this question, see:

Mo. Rate Cases, 230 U. S. 474, 33 Sup. Ct. Rep. l. c. 979.

Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 762.

Kansas City Southern Ry. Co. v. *U. S.*, 52 L. R. A. (N. S.) l. c. 51.

Company v. *Lewis*, 180 N. Y. Supp. l. c. 586.

Ark. Rate Cases, 187 Fed. 290.

State v. *Virginia & T. R. Co., et al.*, 24 Nev. 53, 49 Pac. 945.

Smythe v. *Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418.

Union Pacific R. R. Co. v. *U. S.*, 99 U. S. 402.

Consolidated Gas Co. v. *N. Y.*, 157 Fed. 849.

Cedar Rapids Gaslite Co. v. *Cedar Rapids*, 144 Iowa 426, 48 L. R. A. (N. S.) 1025.

Galveston Electric Co. v. *Galveston*, 258 U. S. 388, 42 Sup. Ct. Rep. l. c. 356.

Company v. *Nixon*, 181 N. Y. Supp. 623.

Re North Adams, 27 Mass. G. & E. L. C. R. 17.

Legg v. *Company*, 1 Calif. R. C. R. 11.

In re Freight Rate, 9 I. C. R. 382.

Ill. Cent. R. R. Co. v. *Interstate Commerce Com.*, 206 U. S. 441, 27 Sup. Ct. Rep. 700.

Darnell v. *Edwards*, 244 U. S. 564, 37 Sup. Ct. Rep. 702.
State ex rel. v. *Public Service Commission*, 252 S. W. l. c. 452.
10 C. J. 411, 12, 13, 18.
10 Fletcher Cyc. Cor., pp. 747, 748.

This method of earned premiums and incurred losses, on which the court was called upon to grant an injunction, was expressly condemned by every judge of the Missouri Supreme Court, and does not state the actual income or the actual outgo of these companies. Judge Ragland, after demolishing this method in the same case between these parties, *Aetna Insurance Company, et al.*, v. *Hyde, Superintendent*, 285 S. W. at page 71 said:

> "The stand now taken by them has the appearance, therefore, of having been contrived by ingenious counsel, or by possibly more ingenious insurance accountants, for the purposes of this case."

What we contend is this: That in asking this court for an injunction, it was the duty of these insurance companies to fully and completely disclose to this court all of their income and all of their outgo. This they have not done and this court can not grant them any relief. We are not going, at this time, to enter into a discussion of the earned premium basis and the premium received basis, because the Missouri opinion is so full and complete that we are unable to add anything to it. This court will have no trouble, after reading that opinion, in finding that this method now presented to this court, of earned premiums, was invented for this

lawsuit, as far as Missouri is concerned, and is absolutely indefensible, erroneous and false. Not having submitted their true experience, of course they cannot expect an injunction. They studiously refrain from telling the court their true experience, and cannot expect a court of equity to grant them any relief.

Judge Ragland further says that for a period of twenty years "the companies, according to the method of computing earnings which they now invoke, had during all of that time made an underwriting profit of less than one per cent," and yet the record shows they paid enormous dividends to their stockholders and their earnings were greater by far than the earnings of any other corporations in America. They settled with their stockholders and paid dividends on the true basis, but they attempt to invoke an utterly falacious method in dealing with the State regarding rates.

In utterly destroying this method now urged before this court and in showing that it is a false method, Judge White in the Aetna case, *supra,* at page 70, said:

> "Was any business ever so generally prosperous? The plaintiffs, by this showing, every 5 years can quadruple their original investment, or double their total accumulations, and at the same time pay as dividends 10 per cent per annum. Three-fourths of this is due to the underwriting business, as they count it, notwithstanding the enormous losses in that branch of the business in Missouri. Yet, as we will show, more than half of the stated investment earnings are directly due to the underwriting business. Are we to believe that rates are so much higher in other States than here, notwithstanding many of them have rating acts, that this enormous profit can thus be accounted

for? The evidence does not show any such condition. On the contrary, by the method of ascertaining profits and losses, which the respondents seek to apply to this case, the companies during the last 20 years have made an underwriting profit of less than one per cent. This in the teeth of the undisputed figures that the underwriting profit has resulted in the enormous gains shown above. Thus the, to us, unexplored mysteries of bookkeeping present the problems to be solved."

And, in finally disposing of this "earned premium" method, as now presented to this court, Judge White, in the Aetna case, *supra,* at page 72 said:

"The referee, in holding with the plaintiffs in that matter, says that method of arriving at the earnings is not satisfactory. It is not only unsatisfactory; it is utterly indefensible. Any method which makes an asset a liability, turns a profit into a loss, shows a profitable business to be a losing business, and writes enormous gains for a long period off the books, cannot be correct on any principle."

In this same experience which this court is asked again to litigate, in the Aetna case, *supra,* page 78, the Missouri Supreme Court found that these companies had earned forty per cent more than an eight per cent profit, and in so holding, said:

"As stated above, a reasonable profit is 5 per cent on the business done, premiums received, and 3 per cent additional for conflagration hazard, or 8 per cent, which would be $6,680,169 for the test period. Therefore, $8,681,964 was an unreasonable profit, and justified a reduction under the circumstances shown. With the war tax eliminated, it would have been $9,310,087, about 40 per cent more than what was conceded to be a reasonable profit."

Appellant apparently stands in this court with only one case to support its contention that the proper method of figuring profit and loss is premiums earned, losses and expenses incurred, as distinguished from the method of premiums paid, losses and expenses paid. That case is *Sun Insurance Office, Appellant,* v. *Clark, Respondent.* (Appeal Cases, Law Reports 1912, p. 443.) This court will observe that was a tax case rather than a rate case. The Missouri opinion so clearly points out the difference between these cases that it hardly seems necessary to further discuss such difference, and this court should know that in a rate case in Kansas, *Aetna Insurance Company, et al.,* v. *Travis, State Superintendent of Insurance,* 259 Pacific 1068, appellant and all other fire insurance companies doing business in Kansas and Missouri abandoned the Sun case, *supra,* and in speaking of such abandonment, the Supreme Court of Kansas, at page 1076, said:

> "It is worthy of note that plaintiffs, since the filing of the former opinion, no longer contend that *Sun Ins. Office* v. *Clark,* (1912) A. C. 443, supports their contention that in computing profits of an insurance company unearned premium should be disregarded; it seems clear that what was decided in that case had been misinterpreted. It is contended, however, that the Bullion Case (*Bullion* v. *Aetna Insurance Co., supra*) is an authority for such holding. As previously noted, this case turned on the interpreting of the state statute. The court even took evidence of the author of the bill and of the ideas he had in mind as to the meaning of the language used, and followed what it found to be the legislative intent. The statute differs from ours. The case is neither controlling nor persuasive here."

It will be observed that the court also distinguished the Bullion case relied upon by appellant, because of a peculiar statute of Arkansas allowing insurance companies a profit upon their underwriting experience. Neither the statutes of Missouri nor Kansas allow any such profit, but simply allow an aggregate profit upon the entire business done.

It is interesting to note in the Kansas case, *supra*, that interest earnings on unearned premiums are figured as a part of the income of a fire insurance company, and also earnings on apportioned capital and surplus. The Missouri Supreme Court decision allows interest earnings on unearned premiums, but the question on the earnings on apportioned capital and surplus was not discussed. It appears to us that the Kansas and Missouri decisions are so clear in showing that interest earnings on unearned premiums should be allowed that we invite a careful reading of these decisions on this point because the lower court in this case refused to allow such earnings. Instead of presenting the matter further we adopt the argument on these points as set out in these two opinions.

It would be impossible for any fire insurance company to show a profit on the erroneous basis now advocated by appellant. The testimony in the Missouri case shows that on this erroneous method fire insurance companies throughout the United States in the past twenty-five years have not earned one-half of 1 per cent profit, and to allow them an 8 per cent profit on such erroneous method would result in fire insurance rates being increased to such an extent that no one could afford to

carry insurance. Such method is fallacious and unsound and we feel unable to add anything to the able opinion cited in support of our contention that the proper method is premiums paid, losses and expenses paid. The matter of reserves is not involved at all. The companies can set up a reserve under either method. In fact a larger reserve can be set up under the method of premiums paid because there will be more money available. This is likewise fully discussed in the Missouri opinion, and this court will have no difficulty in arriving at the conclusion that the method contended for by the State does not in any sense affect reserves or prevent a company from setting up a reserve.

The testimony of this appellant in the Missouri case shows that prior to the institution of this lawsuit appellant never contended that the proper method of figuring profit and loss was on the earned basis. To the contrary it was shown practically without question that every report filed with the Insurance Department since the Rating Act of Missouri became effective in 1915, relating to Missouri business, was on the basis of premiums paid, losses and expenses paid. Appellant and all other companies secured three increases in fire insurance rates in Missouri during this period, and such increases were granted on their application on the basis of premiums paid, losses and expenses paid. Having made their reports to Missouri on this basis and having secured three increases on this basis, the court naturally refused to take them seriously when they attempted to invoke another basis when resisting a 10 per cent reduction order. In 1920 appellant and all other fire insur-

ance companies were granted a 15 per cent increase on the basis now contended for by the State.

Obviously an injunction should not have been granted in this case, for many reasons:

(a) Because no equity is stated in these petitions.

(b) Because this matter has been fully and completely adjudicated and determined between these same parties in a court of their own choosing.

(c) Because these parties stipulated that if they were allowed to retain these excess premiums they would return them to the policyholders of Missouri in case the reduction order was upheld.

(d) Because these companies are not offering to do equity. They are attempting to retain more than $12,000,000 which does not belong to them and should offer restitution before asking any relief from a court of equity.

Much more could be said against these petitions of these plaintiffs. But it is so clear that they are not entitled to any relief that we leave the matter with the court, confident as we are that under no possible theory of this case can any equitable relief be granted them.

IV.

All of the fire insurance companies in Missouri, including appellant, selected their own forum and proceeded to seek a joint review through the state courts as to the validity of the 10 per cent reduction order; the decision of the Missouri Supreme Court sustaining such reduction was undisturbed by the Supreme Court of the United States; the decision of the three-judge court in refusing a temporary injunction to again litigate such reduction was proper as the matter was then res adjudicata on all questions presented.

While the decision appealed from does not expressly hold that appellant cannot again litigate the confiscatory nature of this 10 per cent reduction order, it does say

that since the decision of the Missouri Supreme Court sustaining such reduction was undisturbed by the Supreme Court of the United States, the matter is at an end (R. 105). The court could do nothing but refuse a temporary injunction because the rule is well settled that when a carrier has litigated the confiscatory nature of a reduction order and such reduction order has been upheld by a court of last resort, the matter is ended as to the past effect of such reduction. If such carrier desires to litigate the future effect of such reduction, it may do so, but all matters up to the date of the final decision are concluded and cannot again be inquired into.

On this point the District Court said (R. 105):

> "The fourth purpose became active because the final determination was against the companies. The State Supreme Court upheld the order of reduction and the Supreme Court of the United States declined to interfere. The judgment of the State Supreme Court has become final. Nothing remains to be done by anyone, under the stipulation, except for the companies to repay the 10% excess of premiums collected to those from whom they were collected. One of the expressed purposes of the present complaints is to prevent this repayment.
>
> "This being the situation at the time these complaints were filed, at the hearing and at present, are the defendants justified in asking that this court grant no relief until complainants have performed their remaining part under the stipulation and repaid these excess premiums collected?"

These insurance companies proceeded through the Circuit Court of Cole County, the Supreme Court of Missouri and on to the Supreme Court of the United States. The decision of the Missouri Supreme Court,

which was against them, was undisturbed by the Supreme Court of the United States and questions there involved can never again be litigated. The sole question in that case was whether or not the ten per cent reduction order of October 9, 1922, was confiscatory. The Supreme Court of Missouri held it was not, and these companies cannot again litigate that question, as to that past experience.

They selected their own forum and their own remedy, and having lost, there is nothing for them to do but to now make restitution.

Exactly the same situation arose in *Detroit & M. R. Co.* v. *Michigan Railroad Commission, et al.*, 203 Fed. 864. Certain shippers, alleging that an order of the commission was unreasonable and confiscatory, proceeded through the state courts, as did these insurance companies, and the Supreme Court of Michigan sustained the rates. Thereupon, these companies applied to three judges of the Federal Court for an injunction against the enforcement of the rates, exactly as here, and in a *per curiam* opinion, the District Court refused the injunction and in so doing, in the last paragraph of its opinion, at page 871, said:

> "It follows that the right of the railway company to such a review as any court could give became fixed when the order of the Commission was promulgated; that, to prevent an invasion of its legal right, the railway company could resort to any court of competent jurisdiction; and that, having selected the Wayne Circuit Court in Chancery, and having submitted its controversy to that court, and judgment having been rendered against complainant by that court and by the Supreme Court of Michigan, the railway company cannot now try the same controversy over again in this court."

Thereafter, these railroads carried the case to the Supreme Court of the United States, *Detroit & Mackinac Ry.* v. *Mich. Railroad Commission,* 235 U. S. 402. Mr. Justice Holmes, in declaring what the decision below was, at page 404, said:

> "The ground of the decision below was that the petitioner was concluded by the judgment of the Michigan court; and, of course, if the matter properly can be said to be *res judicata,* there is an end of the case."

Finally at page 406, in holding that the matter was *res judicata* and could never again be inquired into, the court said:

> "The distinction between the judicial function of declaring a rate unreasonable and the legislative one of establishing a rate as reasonable developed in *Louisville & Nashville R. R.* v. *Garrett,* 231 U. S. 298; *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 440; *Janvrin, Petitioner,* 174 Massachusetts, 514. And in *Bacon* v. *Rutland R. R. Co.,* 232 U. S. 134, it was held that statutory provisions very like those of Michigan under a constitution that in like manner separated legislative, executive and judicial powers, gave only the last to the courts. Of course, when once it is established that the bill in the state court was an ordinary though statutory judicial proceeding, we must assume that the plaintiff was bound to present its whole case. *Calaf* v. *Calaf,* 232 U. S. 371, 374. Whether the Commission exceeded its jurisdiction or not, as it purported to make orders the Michigan court had jurisdiction and the appellant is bound by its decree."

An attempt was made to distinguish this case by these insurance companies on the sole ground that having proceeded jointly through the Missouri courts,

their experience was never considered separately by the Federal Court, and that, therefore, their constitutional rights have never been passed upon. However, they submitted their individual experiences in the Missouri case, and later aggregated the amount of premiums in order to show their total collections. Mr. Justice Butler (48 Sup. Ct. Rep. 174) did not in any way suggest that this question could be litigated now by separate companies. They attempt to read this in his opinion but it is not there. If he did intimate any such things, of course he was referring to the future effect of this reduction, and not to the past, as the Supreme Court of the United States has always held that when a carrier has litigated the confiscatory nature of a rate with a public body and lost, that the matter is at an end up to the final decree of the Supreme Court of the United States, and it should not take any citation of authorities to show that these companies, having of their own volition litigated this matter in their own way, and in the forum selected by them, cannot now relitigate the matter.

This was definitely and positively settled by the Supreme Court of the United States in the case of *State of Missouri* v. *Chicago, Burlington & Quincy Railroad Co.*, 241 U. S. 533. It appears in that case that the different railroads in Missouri secured an injunction in the Federal Court for the Western District of Missouri against the maximum freight rate law and the two cent passenger law, and that after a permanent injunction had been granted against such laws, the State of Missouri appealed to the Supreme Court of the United

States, and that court held that the railroads had failed to show that such reduced rates were confiscatory and reversed and remanded the judgment of the District Court with directions to dismiss the bill without prejudice. After that, the State of Missouri filed a suit direct to the Supreme Court of the United States against the Burlington Railroad for excess rates paid it during such litigation. The railroads filed an answer setting up, again, confiscation, taking the position that the order directing the dismissal of the bill "without prejudice" allowed them to again litigate the matter of confiscation, but Mr. Chief Justice White, at page 539, decided against this contention and held that the matter was *res adjudicata* and could never be again inquired into, and in so holding said:

> "Resulting from the principles just stated, recognizing that the operation of a decree enjoining the giving effect to a rate law because of its alleged confiscatory character differed materially both as to the public interest and that of the railroad from the consequences which would arise from a mere decree rejecting the complaint of a person as to an individual and consummated grievance based on the claim that an illegal rate had been charged, it came to pass that a form of decree came to be applied in rate cases to meet and provide for this difference. In other words, in a rate case where an assertion of confiscation was not upheld because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as 'without prejudice,' not to leave open the controversy as to the period with which the decree dealt *and which it concluded,* but in order not to prejudice rights of property *in the future* if from future operation and changed condi-

tions arising in such future it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute *in the future* if a change in conditions arose. The doctrine in the first aspect nowhere finds a more lucid statement than the one made on behalf of the court by Mr. Justice Moody in *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1. It has since been repeatedly applied in language which in the completest way makes the meaning of the limitation without prejudice in such a case clear and leaves no ground for any dispute whatever on the subject. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Northern Pacific Ry.* v. *North Dakota*, 216 U. S. 579; *Louisville* v. *Cumberland Tel. & Tel. Co.*, 225 U. S. 430; Missouri Rates Cases, 230 U. S. 474; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153. A complete illustration of the operation of the qualification is afforded by the North Dakota case, just cited, since in that case as a result of the qualification 'without prejudice' the case was subsequently reopened and upon a consideration of new conditions arising in such *future period* a different result followed from that which had been previously reached. *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585. As to the second aspect, that is the significance of the limitation without prejudice as applied to a decree which enjoined the rates as confiscatory, the meaning of the reservation as we have stated it was in express terms through an abundance of precaution defined and stated in the opinion in the Missouri Rate Cases, 230 U. S. 474, 508."

And at page 541, in holding that after an adjudication that a rate was not confiscatory, only future matters may be litigated, said:

> "But this contention again disregards the doctrine upon which, as we have pointed out, the reservation in rate-making cases came to be applied. In other words, it treats the reservation without prejudice as looking backward and overthrowing that which was concluded by the decree instead of considering it in its true light, that is, as looking forward *to the future* and providing for conditions which might then arise."

And at page 542, in holding that the decree was binding on the railroads there, and the insurance companies here, regardless of its effect upon shippers or policyholders, said:

> "This being true, it is obvious that the question here is not how far the decree relied upon was binding upon parties who were not technical defendants, but how far is it binding upon the railroad."

The same situation as here arose in *Puget Sound Electric Railway* v. *Lee, et al.*, 207 Fed. 860. There railroads litigated the confiscatory nature of a rate to the Supreme Court of Washington. After having lost there, they went into the Federal Court and attempted to relitigate the matter, as these insurance companies are doing here. In refusing to allow them to do so, the court, at page 865, said:

> "The matters alleged as having arisen since the submission to the Washington court are not sufficient to give this court jurisdiction. We repeat the language of the District Court of Michigan. The complainant having selected its forum,

having submitted its controversy to the Washington State court, and judgment having been rendered against it by that court and the Supreme Court of Washington, cannot now try the same controversy over again in this court."

In holding that a matter once litigated could never be litigated again, even though all matters were not offered in evidence, and even though all rights of recovery were not asserted, the Supreme Court of the United States in *Baltimore Steamship Company, et al.* v. *Phillips,* 274 U. S. l. c. 321, said:

"A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evidence.*" ' *Chobanian* v. *Washburn Wire Company,* 33 R. I. 289, 302.

"The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury. *Columb* v. *Webster Mfg. Co.,* 84 F. 592;

Cincinnati, N. O. & T. P. Ry. Co. v. *Gray,* 101 F. 623, 631; *Smith* v. *Missouri Pac. Ry. Co.* 56 F. 458; *Payne* v. *N. Y. S. & W. R. R. Co.,* 201 N. Y. 436, 440; *Chobanian* v. *Washburn Wire Company, supra,* pp. 300-304; *Senn* v. *Southern Ry. Co.,* 135 Mo. 512, 519; *Munro* v. *Railroad,* 155 Mo. App. 710; 727; *Schweinfurth* v. *Railway Co.,* 60 Oh. St. 215, 230-231; *Berube* v. *Horton,* 199 Mass. 421, 425-426. Many other cases are to the same effect. In the case last cited there was a declaration in an action for personal injuries containing a count at common law alleging failure to provide a reasonably safe place, and a count under the Employers Liability Act alleging a defect in the ways, works, or machinery. To this declaration, after the expiration of the period of the statute of limitations, an amendment was allowed alleging negligence of the defendant's superintendent as the cause of the same accident. The Massachusetts Supreme Court held that the statute of limitations could not be invoked because the amendment did not state a new cause of action, that cause of action being 'the injury under the circumstances under which it took place.' "

And in holding that it was the object sought rather than the method followed that would control and that where these insurance companies attempted to set aside this reduction order, for any reason, and the court refused to do so, that the matter was at an end, and could not again be litigated, the same court, in *Fugurul* v. *Rivera,* 232 U. S. l. c. 374, said:

> "In the former suit the appellants alleged the same descent, but instead of alleging express and solemn recognition of Ramon by Salvador as his natural son, sought to have him declared such and therefore entitled to inherit one-half of Salvador's estate. Its immediate object was to establish filiation by a judgment while the imme-

diate object here is to nullify a will. The theory put forward was so far different, that unless the complaint in this case had been interpreted as alleging a recognition in solemn form it would have been held bad on its face. In the former suit also the mother was alleged to have been a slave. *But these differing allegations are simply different means to reach the same result;* the possession by Ramon of the rights of a natural son; and the evidence offered in this case like the allegations in the former one was only of private acts. In these circumstances the true principle has been declared by this court to be that a judgment or decree bars all grounds for relief sought. *Northern Pacific Ry. Co.* v. *Slaght,* 205 U. S. 122, 130, 131. *United States* v. *California & Oregon Land Co.,* 192 U. S. 355, 358."

These insurance companies said that they made a mistake in proceeding through the state courts jointly, but that they should have proceeded separately, and Stone, Circuit Judge of this Circuit, in *Smith* v. *Apple,* 6 Fed. (2d) l. c. 563, in holding that where a party proceeds of his own volition but improperly so, that he is not in a position thereafter to ask relief from a court of equity, said:

"If the pendency of the suit had been presented to the Kansas Court and that court had failed to protect Smith in that regard, there would be much strength in his present contention; but when a party has a defense which he could have interposed, and is not prevented from so doing by fraud, accident or mistake, he cannot reserve that defense to some other time or forum and thus split up litigation. If he suffers through his negligent failure to interpose the defense at the proper time and in the proper court, it is from his own fault and he cannot ask relief therefrom *in a court of equity.*"

Judge Sanborn of this circuit announced the same rule in a very able opinion in *Pierce* v. *National Bank of Commerce in St. Louis*, 268 Fed. l. c. 495:

> "First. Where the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question and issue which was or might have been presented and determined in the first suit. *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 400, 72 C. C. A. 405, 420, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Id. 199 U. S. 607, 26 Sup. Ct. 747, 50 L. Ed. 331; *Southern Pacific Ry.* v. *United States*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; *Linton* v. *National Life Ins. Co.*, 104 Fed. 584, 587, 44 C. C. A. 54, 57."

It was not necessary that the court deny a temporary injunction to appellant on the sole ground that the stipulation was violated because, under all of the authorities in America, it was the duty of appellant to first make restitution of all it had received by way of excess premiums before applying to a court for an injunction. Appellant lost its suit to have such reduction order declared invalid. It was then in no position to apply for a temporary injunction until it had made restitution. There is no exception to this rule. Therefore, the court properly held that (a) no injunction should be granted until the stipulation was complied with and restitution made; (b) that in view of the fact that appellant had lost its suit wherein it alleged such reduction was confiscatory, appellant should make restitution of all received in violation of law before asking any other relief.

In all of the litigation between the state and these insurance companies only one thing was sought by them and that was the setting aside of the 10 per cent reduction order. No matter how they proceeded or what evidence they offered that was their object. They practically said that, having made a mistake in litigating the matter jointly, and the Supreme Court of Missouri having found against them in all issues involved (Aetna Insurance Co. *et al.* 285 S. W. 65), they could then go into a Federal Court and each of the companies bring a separate suit and again litigate their experience for the same period. Obviously, if this were true, when there is both a joint and a separate cause of action, litigants might join and each losing, might proceed to litigate the same matter. They had their day in court and the decision of the Missouri Supreme Court and the Supreme Court of the United States was against them. As the experience in the past was closed by these decisions, there is nothing for them to do but to make restitution, as held by the District Court. While very little discussion may be found in Judge Stone's opinion regarding *res adjudicata,* the authorities are so clear that this court will have no difficulty in holding that nothing remains to be done in this seven years litigation except to repay to the policyholders of Missouri the sum of money due them, which was wrongfully collected under an order of the Circuit Court of Cole County and which has since been set aside.

V.

While the decision of the three-judge court is not conclusive on this court, yet great deference will be paid to its finding, and where the decision was justified by both the law and the facts, as in this case, this court will not disturb same.

The three-judge court refused a temporary injunction to appellant and 113 other fire insurance companies doing business in Missouri because such companies were attempting to violate a solemn stipulation which they had entered into with the State of Missouri. Such court stated that it was justified in refusing such injunction because the petitions did not state sufficient facts to constitute a cause of action in that the method of calculating a profit or loss was erroneously stated. In holding that the Supreme Court of the United States will not interfere with such holding, Mr. Chief Justice Taft, in *Chicago Great Western Railway Company* v. *Kendall, Governor of the State of Iowa, et al.*, 266 U. S. l. c. 100, said:

> "It would take a very clear case upon the record to justify this court in setting aside the conclusion of a court of three judges under Section 266 upon what is solely a question of fact and an exercise of sound judicial discretion as to the just balance of convenience in granting or withholding a temporary suspension of the operation of a state law in the collection of taxes."

Appellant and all other fire insurance companies resisted the 10 per cent reduction order, effective November 15th, 1922, by proceeding through the State Circuit Court and on to the Supreme Court of Missouri. The decision there was against them. (*Aetna*

Insurance Company v. *Hyde*, 315 Mo. 13; 285 S. W. 65.) This court in *Aetna Insurance Company* v. *Hyde*, 275 U. S. 440, refused to disturb the judgment of the Missouri Supreme Court sustaining such reduction order, and appellant was one of the plaintiffs in that suit in this court. Thereafter appellant filed this suit asking for an injunction against the same reduction order and a three-judge court denied a temporary injunction for the following reasons:

(a) Because appellant had stipulated that in case such reduction order was upheld, it would refund all excess premiums collected, and it had failed to do so (R. 108, 109).

(b) Because the judgment of the State Supreme Court had become final and the same experience could not again be litigated (R. 105).

(c) Because the burden of proving confiscation was not met by appellant because it had not fully disclosed its income and outgo (R. 127).

The rule is universal in this court that great deference will be paid to the finding of a three-judge court, and in holding that under these circumstances this court will not interfere with the decision of the lower court, Mr. Justice Stone, in *United Fuel Gas Company* v. *Public Service Commission of West Virginia, et al.*, 278 U. S. l. c. 326, said:

> "An order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion. *Chicago Great Western Ry.* v. *Kendall*, 266 U. S. 94, 100; and see *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141.

> To support the burden resting upon it, appellant, while challenging generally the correctness of the court's valuation, places its chief reliance on the alleged erroneous valuation of its gas field. To support the claim to a much higher valuation, it relies upon the same theories and the same method of ascertaining the value of the gas field as were pressed upon us in No. 1 (*ante,* p. 300). With respect to this item, after making the same assumptions as in that case, we reach the same conclusion. for reasons there stated at length, that there is no dependable evidence of value of appellant's gas field in excess of the value assumed on its books; that no ground is presented for assigning to it a value beyond the $6,343,329 so assumed on appellant's books, a smaller value than that used by the court in its calculations."

The United Fuel Gas Company case, *supra,* is identical with this case. There they had failed to prove confiscation or offer any credible testimony which would justify a court in finding in their favor. The same situation exists here. Appellant failed and refused to inform the court as to its income and outgo. The court could do nothing but deny a temporary injunction and under the authorities of this court such refusal was proper.

There were many reasons why a temporary injunction should not have been granted and this court will be able to sustain the three-judge court on many grounds. In stating the rule that this court would ordinarily not interfere with the discretion of the trial court in refusing or granting a temporary injunction, Mr. Justice McReynolds, in *Meccano, Ltd.,* v. *John Wanamaker, New York,* 253 U. S. l. c. 141, said:

"The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Rahley* v. *Columbia Phonograph Co.*, 122 Fed. Rep. 623; *Texas Traction Co.* v. *Barron G. Collier, Inc.*, 195 Fed. Rep. 65, 66; *Southern Express Co.* v. *Long*, 202 Fed. Rep. 462; *City of Amarillo* v. *Southwestern Telegraph & Telephone Co.*, 253 Fed. Rep. 638. The informed judgment of the Circuit Court of Appeals exercised upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this court will not interfere with its action. No such reasons are presented by the present record."

Obviously, this court will not interfere with the decision of the three-judge court in this case because there was nothing presented to justify a temporary injunction. Appellant litigated this question clear to the Supreme Court of the United States and the decision was against it. To now allow it to litigate this question again will open the door to every litigant and allow a reconsideration of every question. There must be an end to all things and this seven years of litigation should now end. Appellant has had every opportunity to prove this reduction order confiscatory and has failed to do so.

VI.

The Missouri Fire Insurance Rating Act is constitutional. Fire insurance is a business affected with a public interest and it is well settled that a state may regulate fire insurance rates.

Prior to 1915, fire insurance companies in Missouri conducted their business under the Anti Trust Laws.

That year the fire insurance rating act was passed and these insurance companies now assert that it is unconstitutional. Yet it is similar to practically all of the rating acts in America and these have been upheld time and time again and we are unable to appreciate the force and effect of the assault upon this act.

Mr. Chief Justice Taft, in announcing the rule that fire insurance rates might be regulated, in *National Union Fire Insurance Company* v. *Wanberg*, 260 U. S. l. c. 73, said:

> "The decision of this court in *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, settled the right of a state legislature to regulate the conduct by corporations, domestic and foreign, of insurance as a business affected with a public interest."

The first time this question came before the Supreme Court of the United States, construing rating acts, was in the well considered case of *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. Rep. 612; L. R. A. 1915, 1189. And in sustaining the Rating Act of Kansas, the court said:

> "A *business* may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon property, and although the public may not have a legal right to demand and receive service. *The business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates.*"

And in holding that the business of fire insurance is subject to regulation, the Supreme Court of Oklahoma, in *Insurance Company of North America, et al.*

v. *Welch, Ins. Com'r et al.*, 49 Okla. 620, 154 Pac. l. c. 50, said:

> "In recent years the business of insurance has grown to such an extent that its ramifications extend to practically every phase of business in the commercial world, and the necessity for regulation of the business has become more and more apparent, until legislation having that purpose was enacted and brought into review before the courts, with the result that the right of the state to regulate the same has been finally determined."

In *State ex rel. Waterworth* v. *Harty, Superintendent*, 278 Mo. 685, the Supreme Court of Missouri sustained the Missouri Rating Act and held that the review therein provided was judicial, and in so holding, at page 692, said:

> "The power to regulate insurance rates arises out of the same considerations which give origin to the power to regulate other rates, i. e. the business is affected or 'clothed' with a public interest (*German Alliance Ins. Co.* v. *Kansas, supra*). *The* power to regulate rates, called into existence by the presence of a public interest, falls within the police power of the state and is purely legislative in character (*State ex rel.* v. *Public Service Comm.*, 204 S. W. 497; *Interstate Comm.* v. *Railway*, 167 U. S. l. c. 499, 500, and cases cited). It is not contended legislative powers can be delegated to or exercised by the courts. The constitutional provision above set forth expressly prohibits it. It *is* insisted that this proceeding involves no violation of the constitutional principle. By the statute under which this suit is brought it is explicitly provided, among other things, that 'rates shall not be raised' until prescribed notice has been given to the Superintendent 'and his approval obtained.' Obviously, the proposed rates are not yet existing and cannot,

under the act, become rates at all until the Superintendent's approval has been secured. The approval of the Superintendent is essential to the transformation of the *proposed* rates into *existing* rates. This approval is the final act in the process of making increased fire insurance rates. This final act in the process of rate making this court asked to *compel* the Superintendent to perform. 'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is a making of a rule for the future, and, therefore, is an act legislative, not judicial in kind.' "

In this same case, between these same parties, *Aetna Insurance Company et al.* v. *Hyde, Superintendent,* 315 Mo. 13, 285 S. W. 65, the Missouri Rating Act was construed and upheld.

If other authorities are needed on this point, we invite a reading of the following cases:

Henderson v. *McWaters,* 104 S. C. 268.
Martin v. *Howard,* 96 Neb. 278, 147 N. W. 689.
Company v. *Barnes,* 189 Fed. 769.
Company v. *Railroad,* 77 N. H. 6, 45 L. R. A. (N. S.) 845.
People v. *Company,* 126 Ill. App. 636.
12 C. J. 850.

If the court is interested in the different rating acts in the United States, we cite them:

Arkansas: Ark. Digest, Section 5962.
Colorado: Compiled Laws of 1921, page 843.
Idaho: Session Laws of 1923, page 53.
Indiana: Laws of 1919, page 512.

Kansas: R. S. Kansas 1923, page 636.
Kentucky: Carroll's Kentucky Statutes 1922, page 762 B-33.
Michigan: Public Acts of Michigan 1923, page 25.
Minnesota: Laws of Minn. 1915, page 135.
Mississippi: Laws of Miss. 1924, Chapter 188, Sec. 10.
Missouri: R. S. Missouri 1919, Section 6283.
New Jersey: Compiled Statutes of N. J. 1915, page 816.
New York: Laws of N. Y. 1923, pp. 691-693.
Ohio: Laws of Ohio 1917, page 745.
Oklahoma: Session Laws of Oklahoma 1915, page 341.
Oregon: Laws of Oregon 1917, page 358.
Pennsylvania: Laws of Pa. 1921, page 743.
South Carolina: Laws of S. C. 1916, page 675.
South Dakota: Session Laws of S. D. 1919, page 239.
Tennessee: Public Acts of Tenn. 1919, page 70.
Texas: Texas Statutes 1920, page 776.
Vermont: Laws of Vermont, 1919, page 158.
Virginia: Laws of Virginia, 1920, page 238.
Washington: Pierce's Washington Code 1919, Vol. 1, page 2981.
West Virginia: Laws of West Virginia 1920-1921, page 565.
Wisconsin: Laws of Wisconsin, 1917, page 166.
Wyoming: Laws of Wyoming, 1921, page 226.

Many of these acts are exactly similar to that of Missouri. Others provide for an underwriting profit while Missouri provides for a reasonable profit. However, those rating acts expressly authorizing the regulation of rates are: Arkansas, Colorado, Kansas, Kentucky, Minnesota, Mississippi, New York, Oklahoma, Oregon, South Carolina, Texas, Vermont, Virginia, Wisconsin and Wyoming.

So far as we have been able to ascertain no court has declared any of these rating acts unconstitutional. They have been sustained time and time again as we have pointed out under this point, and we do not believe there is any merit at all in the assault against the Missouri Rating Act as made by these insurance companies at this time.

The Supreme Court of Kansas upheld a reduction order of that state similar to this one. The opinion is a very interesting one and we suggest that it be read in connection with this case, as it fully sustains the position of the state as to the constitutionality of a similar rating act and upholds a similar reduction. *Aetna Insurance Company, et al.*, v. *Travis*, 257 Pac. 337; *Aetna Insurance Company, et al.*, v. *Travis*, 259 Pac. 1068.

Relator asks a reconsideration of the case of *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 389. Inasmuch as this opinion has been followed by practically every state in the American Union and has been reaffirmed by this court, we deem it inadvisable to present an argument in its support. To now say that fire insurance is not affected with a public interest is to proceed backwards. These companies proceeded through the Missouri Supreme Court on the theory that the Missouri Rating Act was constitutional and, having lost their lawsuit on facts, now take the position that such Act is unconstitutional. This they can not do.

Conclusion.

For seven years appellant and all of these other fire insurance companies doing business in Missouri

have resisted a 10 per cent reduction in fire insurance rates, effective November 15th, 1922. The Missouri Supreme Court found against them and upheld the reduction order. The Supreme Court of the United States refused to disturb such finding. A three-judge court denied them a temporary injunction to again litigate this question. The discretion of such court in refusing such injunction will not be set aside by this court in the absence of a strong showing that such injunction should have been granted. The court was justified in refusing this injunction on many grounds other than those stated by the court, and we respectfully insist that this litigation should end and that the judgment of the lower court should be affirmed.

Respectfully submitted,

STRATTON SHARTEL,
Attorney General of Missouri,
G. C. WEATHERBY,
Assistant Attorney General,
FLOYD E. JACOBS,
JOHN T. BARKER,
Counsel for Appellees.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 104.—October Term, 1929.

National Fire Insurance Company of Hartford, Appellant, *vs.* Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, et al.	Appeal from the District Court of the United States for the Western District of Missouri.

[April 14, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

This is one of 155 suits brought by stock insurance companies to have § 6283, Revised Statutes of Missouri, 1919, adjudged invalid and to restrain the enforcement of an order of the state superintendent of insurance promulgated October 9, 1922, on the ground that the section and order are repugnant to the due process and equal protection clauses of the Fourteenth Amendment. In each case there was an application to a court of three judges for an interlocutory injunction. 28 U. S. C., § 380. It was denied, without prejudice to renewal upon condition specified, in 114 cases of which this is one, and it was granted in 41 cases. 34 F. (2d) 185. This is an appeal from the denial of plaintiff's application. 28 U. S. C., § 345(3).

Section 6283 provides:

> "The superintendent of insurance . . . is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections . . . to not more than a reasonable profit. Any reduction ordered . . . shall be applied, subject to his approval: *Provided*, that the superintendent of insurance shall designate the class or classes

to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. . . ."

Section 6284 provides that the orders of the superintendent shall be reviewable by the courts, that upon such review the entire matter shall be determined *de novo*, and that while it is pending insurers shall not charge any rate in excess of that fixed by the superintendent.

January 5, 1922, the superintendent had directed that rates on all fire, lightning, hail and windstorm insurance be reduced 15 per cent. The plaintiff and other stock insurance companies doing business in Missouri brought a joint suit in the circuit court of Cole county to enjoin the enforcement of that order. Temporary restraint was granted. The attorneys for the respective parties entered into a stipulation reciting that the superintendent had revoked the rate order and agreeing that there be entered of record in the case an order in substance as follows:

> The case is dismissed and the restraining order dissolved.
>
> The superintendent may call a hearing to investigate the necessity for a rate reduction; the companies will produce evidence required by him or that they may see fit to present; at the conclusion of the hearing he will make findings of fact and announce his determination thereon, and he shall also make certain specified findings.
>
> If based on such findings and determination, an order be made reducing rates, it will apply alike to all classes of risks and, if dissatisfied, the companies will proceed to secure a review of the order in the circuit court of Cole county.
>
> No injunction to restrain the reduction shall be applied for; but, pending such review and until final determination of the case, the rates in force prior to the making of the order will be collected by the companies and they will "give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order . . . be finally sustained by decree or judgment of a court of last resort."
>
> The question of the constitutionality of §§ 6283 and 6284 will not be raised nor will the legality of the hearing provided for be questioned.

October 9, 1922, the superintendent made the order that is the subject of this suit. It directed that, effective November 15, rates be reduced 10 per cent. November 10, plaintiff and other companies

brought the matter before the court named in the stipulation for review. Upon the requirement of the court they executed a bond for the use of those to whom insurance policies might be issued by them prior to final decree. That court held the rates confiscatory and set aside the order. Its judgment was reversed in the state supreme court. 315 Mo. 113. The case was brought here and, January 3, 1928, was dismissed on the ground that no federal question was presented. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440.

February 1, 1928, the superintendent designated the classes of risks to which the reduction should be applied, and thereupon this suit was commenced. The district court found the stipulation valid and that under it plaintiff, and other companies in whose behalf it was made, had collected rates in excess of those prescribed and had failed to refund. On that ground the court denied plaintiff's application, but without prejudice to renewal after repayment.

Plaintiff contends that the stipulation made in the earlier case by the attorneys for all the companies cannot operate against it in this case. The stipulation shows that when it was made another rate reduction was contemplated. All its provisions, except the one dismissing the review then pending, relate to procedure to be followed in making the reduction and for review. In lieu of the rule that during the pendency of the review insurers should not charge any rate in excess of those fixed by the superintendent (§ 6284), it was arranged that the rates existing prior to the order should continue to be charged until final determination of the case. The companies were to give a bond to be fixed by the court to secure refund should the reduction finally be sustained. It is clear that the stipulation was intended to apply to the subsequent order and to any review of it.

But plaintiff insists that the stipulation contains no promise to refund. The pertinent language is quoted above. The stipulation and order constituted the only basis of the companies' right to continue to collect the higher premiums. When read having regard to the circumstances and context, the quoted language reasonably may be construed to be a promise by each company to return to its policy holders the excess charges paid by them pending final determination of the validity of the reduction.

Plaintiff claims that the superintendent failed to make the specified findings and so relieved it from any obligation under the stipulation. An affidavit filed in support of its motion for tempo-

rary injunction states that the superintendent did not make these findings. The order is not in the record. The plaintiff failed to present the findings that were made. There is no showing that the companies produced the information called for by the superintendent or that he was not lawfully excused from making such findings. We may notice the record of that case in this court.* 275 U. S. 440. The order is there fully set forth. It states that the companies refused to furnish the superintendent the necessary facts and that accordingly such findings could not be made. Clearly plaintiff's showing is not sufficient to require the court to find that the superintendent was not excused by the companies' refusal to furnish information as agreed.

Plaintiff contends that the collection of the higher rates was not made pursuant to the stipulation. It does not appear whether, in addition to prescribing the bond, the court authorized the collection of higher premiums until final determination of the validity of the reduction. The stipulation was sufficient to support such an order, and there is nothing in the record to require a finding that one was not made. See *State ex rel. Hyde* v. *Westhues*, 316 Mo. 457, 466. In view of the requirement of § 6284 that pending review insurers shall not charge more than the reduced rates and in the absence of any other disclosed authority to continue to exact the higher premiums, it is right to attribute the excess charges to the promise to refund.

Plaintiff lays much emphasis upon the fact that it will suffer irreparable loss if compelled to apply the lower rates during the litigation and the order is finally held unlawful, whereas, if the temporary injunction be granted, policy holders may be protected by an appropriate provision in the decree. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 815. But, in respect of plaintiff's right to have a temporary injunction, its position is not as good as it would have been if this suit had been brought when the rate order was passed. As

*Butler *v.* Eaton, 141 U. S. 240, 243. Aspen Mining & Smelting Co. *v.* Billings, 150 U. S. 31, 38. Washington & Idaho R'd. *v.* Coeur D'Alene Ry., 160 U. S. 101. Craemer *v.* Washington, 168 U. S. 124, 129. Bienville Water Supply Co. *v.* Mobile, 186 U. S. 212, 217. Dimmick *v.* Tompkins, 194 U. S. 540, 548. Fritzlen *v.* Boatmen's Bank, 212 U. S. 364, 370. de Bearn *v.* Safe Deposit Co., 233 U. S. 24, 32. Freshman *v.* Atkins, 269 U. S. 121, 124. United States *v.* California Canneries, 279 U. S. 553, 555. Cf. Pickford *v.* Talbott, 225 U. S. 651, 654.

against the joint attack the reduction has been sustained by the court of last resort. Plaintiff has not repaid the policy holders. It now assails the statute as well as the order and seeks again to prevent the taking effect of the prescribed rates. The retention of the higher premiums that it obtained by means of the stipulation and the denial of its promise to refund are facts properly to be considered. Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief. *Deweese* v. *Reinhard,* 165 U. S. 386, 390. While the rule which plaintiff invokes is one of general application, it cannot be said that the lower court erred in withholding relief until plaintiff makes good its promise to refund.

Plaintiff contends that, as the companies failed to submit, and the superintendent until February 1, 1928, did not designate the classes to which the reduction should be applied (§ 6283), the lower rates did not take effect until that time. But by the stipulation the parties agreed that such order should apply to all classes alike. That was a sufficient designation in advance. And the promise to refund, the bringing of the suit to review the reduction and the giving of the bond all support the view that, as to the companies making the stipulation, the rate reduction was then consummated. The court's imposition of the condition that excess premiums collected from November 15, 1922 be repaid is not without adequate support.

A decree of the district court denying an interlocutory injunction will not be reversed unless shown to be contrary to some rule of equity or the result of an improvident exercise of judicial discretion. *Meccano, Ltd.,* v. *John Wanamaker,* 253 U. S. 136, 141. *Chicago Great Western Ry.* v. *Kendall,* 266 U. S. 94, 100. Applying that rule we find no adequate ground for reversal.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.